FILED
JUN 8 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, A. D. 1955.

No. 148

KATHERINE W. BRADLEY and Others,
Trial Court Petitioners,
Respondent here,
and
BENNET BOTSFORD YOUNG,
Trial Court Petitioner,
Respondent here,
vs.
Lake Dearborn Corporation and Others,
Trial Court Defendants,
Respondent here.

EVELYN PRATT ELLITHORPE,
Trial Court Defendant,
Petitioner here.

Appeal from the Circuit Court of Cook County.

Burnt Record Proceedings.

Petition for Certiorari.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

(Appendix A—Time and Events Table;
Appendix B—Appellate Court Opinion;
Appendix C—Petition for Rehearing;
Appendix D—Provisions of Constitutions.)

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Petition for Writ of Certiorari

May it Please the Supreme Court:

Evelyn Pratt Ellithorpe seeks a writ of certiorari, to be issued by this Court, to review the decree and opinion by the Appellate Court of Illinois, First District, rendered and

filed October 31, 1955; its order denying Petition for rehearing November 16, 1955; and also the orders by the Supreme Court of Illinois; (1) November 16, 1954 which refused a hearing on direct appeal to that court, but transferred the litigation to the Appellate Court of Illinois, First District; (2) November 24, 1954, which refused to allow the filing of a Petition for Rehearing in that court; (3) and the order March 15, 1956, which denied petition for leave to appeal, from the prior action of the Supreme Court and action by Appellate Court. Petitioner has exhausted all judicial remedy before courts of Illinois.

Said order March 15, 1956 by Supreme Court of Illinois, reads as follows:

> "And now on this day the Court having fully considered the Petition for Leave to Appeal as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer and denies Leave to Appeal herein." (Transcript March 23, 1956 on file).

See 15 U of C Law Review 116.

One Opinion, Denial of Rehearing.

The circuit court of Cook County and the Supreme Court of Illinois did not render opinions. All evidence was heard only before the Master. (Report by Master at Abstract pages 143-206). The opinion by Appellate Court of Illinois is appendix B to this Petition. And Petition for Rehearing is appendix C to this Petition. That opinion is not printed in Appellate Court reports, and not printed in the NE 2 reports, but is partially digested there: 7 Ill. App. 440 and 129 NE 2d 578: under heading of Judicial Notice.

Thumb nail analysis of court record is given by time table sequence at Appendix A, page 53.

Statutes and Constitutions.

Those that are most relevant and necessary to the issues, are set forth in the body of the petition and in the appendix. All are listed above in the Index to contents.

For Constitutional Provision see Appendix D.

Federal Statutory Basis for Certiorari.

Timely application for review by this Court, is made by presenting and filing the record and this Petition for Writ of Certiorari. The Petition is prepared pursuant to section 1257 (3) of Federal Judicial Code, and rules 19 and following of Supreme Court rules; as amended.

The petition and record are presented and filed in this Court within ninety days after March 15, 1956, when the Supreme Court of Illinois denied petition for leave to appeal from the decree and opinion by the Appellate Court, First District, entered and filed October 31, 1955. #2101 (c) Federal Judicial Code.

Supreme Court Rules Basis for Certiorari.

In accordance with rule 19, Your Petitioner asserts that herein the Illinois Courts have decided federal questions of substance not heretofore determined by this court, and also have decided other federal questions in a way probably not in accord with applicable decisions by this Court.

Federal questions are presented for review.

Ellithorpe raised on the record, precise issues under provisions of the federal and state constitutions, as to due process, equal protection of the laws, uniformity of laws, and equal administration of the laws, by apt pleadings and motions in writing in trial court, (Abst. 81, 96, 100, 104 and elsewhere) and by petition for rehearing be-

fore the Appellate Court (appendix B). All these constitutional issues were presented and urged by briefs before the Illinois Courts.

Whether the Supreme Court of Illinois and the Appellate Court of Illinois, denied due process of law and denied equal protection of law, by their refusal and failure to pass upon any of the constitutional questions which are presented by the record at bar; and by their failure and refusal to order that the Master and the circuit court shall conform in this case to the established law and procedures of Illinois.

Whether in this litigation about the same real estate, the Illinois Courts by decrees in the year 1954, may ignore the bar, and the validity, and the finality, of former decree recorded in December 1936, entered by court of equity as to title to said real estate, by the United States District Court at Chicago in bankruptcy case No. 56924, which was a proceeding in chancery for reorganization of a corporation that existed solely to own and operate said real estate. Your Honors denied that possibility in your decision of *Stoll* v. *Gottlieb,* 305 U.S. 165, where you reversed and overruled the Illinois Courts, which had entered judgment for plaintiff in that suit, contrary to an earlier reorganization case in federal District Court at Chicago.

Whether justice under constitution will permit Bradleys and Young as aggressor litigants in a court of equity, to use weasel words and general language in final decree January 8, 1954 in circuit court in this litigation; over objection then made by Ellithorpe and denying her request then made for saving clause; and thereon thereafter claim

unlimited title to real estate; contrary to their own wilful acts of record:

1) demanding and obtaining special final order June 17, 1947, for severance and dismissal without prejudice, on ground of want of any jurisdiction of the subject matter, of the factual defenses by Ellithorpe under leasehold upon the same real estate, filed and presented at once after summons served upon Ellithorpe, said factual defenses being made in form of answer, caveat and cross-claim for full discovery and full relief: and

2) thereafter on December 15, 1947, filing general answers and defenses for same Bradleys and Young and agents Farr and Chinnock, in separate litigation begun by Ellithorpe in the Superior Court of Cook County No. 47S 18083 in compliance with said order for dismissal without prejudice, Ellithorpe thereby asking for lien on the reversion of same real estate, and for accounting from reversioner estates with partition and sale of the leasehold for benefit of all shareholder successors to defunct Lake Dearborn Corporation as former owner of leasehold; pursuant to the partition statutes and real estate laws of Illinois.

3) thereafter in January 1952, Bradley and Young filing in this litigation for reference, a copy of their said defenses in case No. 47 S 18083:

4) thereby showing as to lien on the reversion, leasehold matters and accounting, that Bradleys and Young and their realtor agents, have joined issue in making said case 47 S 18083, a prior action pending, so far as said issues are concerned: and showing thereby the necessity for the exclusion saving clause Ellithorpe asked for, as protection against general language of decrees entered January 8, 1954.

Whether by all their action the Master and circuit court, denied due process of law and denied equal protection of law by refusal to follow and enforce the severance order dated June 17, 1947; since it was of necessity accepted and performed by Ellithorpe in good faith, by her filing and pursuing her suit No. 47 S 18083 now pending in the

Superior Court of Cook County; which separate suit so remains unheard and waiting for disposition after finality in this present litigation (Abst. 50, 206-232).

Whether the Master and Circuit Court denied due process of law and equal protection of law, by refusing to compel Bradleys and Young as litigants, to comply with provisions of Civil Practice Act, Burnt Records Act, Corporation Act, Conveyance Act, and other applicable and governing statutes of Illinois: and by refusal to enforce *res adjudicata* of pleas in bar based upon year 1936 decree in bankruptcy, from the United States District Court at Chicago, governing the title to said real estate, and by refusal to enforce *res judicata* of the severance order entered June 17, 1947 by circuit court.

Whether the circuit court made departure from established procedure and law by striking and dismissing various pleas in bar and motions filed by Mrs. Ellithorpe, each of which stated substantial defense to pleading by Bradleys and Young, and whether circuit court erred in unconstitutional manner, by refusing to dismiss the litigation pursuant to said pleas and motions.

Whether the circuit court acted in unconstitutional manner, and made departure from established law and procedure, by entry of decrees January 8, 1954, because the record does not contain basic and necessary evidence to sustain any decree. The record relies upon an act of "judicial notice" as basis for this statutory litigation. The statute requires "proof of the facts stated in said petition". Chapter 116, Section 18 of Illinois Revised Statutes. No proof was made of basic facts.

Whether in this equity litigation (by statute in Illinois—Section 92 1b and 3d of Civil Practice Act, chapter 110 of Illinois revised statutes—both the Supreme Court and Appellate Court of Illinois, have the duty to review all

fact issues in equity) the Master and circuit court erred in unconstitutional manner, and made departure from established law and procedure, by refusal and failure to enforce section 4 of statute of frauds of Illinois against litigants Bradleys and Young, who did not plead nor prove any loss nor absence of their own real estate records; nor offered any proof of loss by fire at any time; nor about any loss, absence nor destruction of any documents nor records pertaining to their own land titles; but Bradleys and Young by their own witness evidence admitted that a guaranty policy for one million dollars was issued in the year 1928 and remains outstanding describing said real estate of Bradleys and Young, and insuring fee title subject to the leasehold interests; and their own witness evidence shows that Bradleys and Young through this litigation seek from the same title company, only a new guaranty policy. They do not seek and have not applied for any abstract of title (Abst. 103, 175, 183, 184). Whether the litigation is a fraudulent subterfuge to harass Ellithorpe.

Tyler v. *Tyler*, 401 Ill. 435 and *Dombrow* v. *Dombrow*, 401 Ill. 324.

Whether action taken by Illinois Courts on this record, make departures from the established practice and procedure of historic chancery as disclosed by the constitution of Illinois and the settled decisions of Illinois and this Supreme Court, constantly followed prior to this litigation. Those decisions by courts of Illinois and this Court, during many decades before this litigation, necessarily became an established portion of the constitutional rights of Your Petitioner. The sudden departure by the courts of Illinois in this litigation, is not construction nor interpretation of statute or constitutions, but effects an outright seizure by court of power, and an arbitrary denial of fed-

eral constitutional rights vested in your Petitioner as herein stated. The separateness and the continuance of chancery practice and procedure in Illinois as developed by legal history, is established and confirmed by the Constitution of Illinois (page 42 below) and confirmed by rule 11 of Supreme Court of Illinois.

STATEMENT OF THE CASE BY PLEADINGS.

This litigation began as two separate burnt record petitions, filed as Nos. 1767 and 1766 in Circuit Court of Cook County, in Chancery, based upon Special Statutes; Illinois Revised Statutes Chapter 116, Section 5 and following. By one law firm, on same day, Bradleys filed one petition, and Young the other. These petitions are alike in substance, but mention adjoining parcels of real estate, and No. 1767 mentions more parties as defendants. These suits were consolidated by order June 17, 1947 (Abst. 33) pursuant to an affidavit (Abst. 30-33) stating adequate basis for such an order. No opposing statement was ever made on the record. In the Supreme Court of Illinois an order for consolidation on appeal, was made August 10, 1954. One brief was filed for entire burnt record litigation, in all Illinois Courts. Pursuant to rule 23-5 one Petition for Writ of Certiorari, is now filed in this Supreme Court of the United States.

Record filed in this Court.

By order of the Supreme Court of Illinois on December 23, 1955, that consolidation continues in effect (See Transcript of record). With this petition for writ of certiorari, Ellithorpe presents and files one record so consolidated, and certified by Clerk of Supreme Court of Illinois, which

includes entire record from Circuit Court of Cook County and from Appellate Court First District, as printed for use before the Illinois Courts. Pursuant to your rules, nine copies of the printed record, are filed with this Petition for Writ of Certiorari.

One Building Covers The Land.

About the year 1928 a single unit of ten-story and two basement, steel and concrete garage building was erected to cover all parcels of real estate (Abst. 30) at a cost of more than one million dollars, by a lessee under 99-year leases from each of the then several parcel owners (Abst. 23). At that time a guaranty policy for one million dollars was issued by Chicago Title and Trust Company, to guarantee the title to fee and leasehold, for all parcels concerned in this litigation, as a unit of real estate (Abst. 30-31, 182), including modern 12-story garage. None of the matters herein claimed by Bradleys and by Young as bases for their litigation, were set forth and none were made objections or exceptions in that guaranty policy.

Title Assured by Guaranty Policy.

That policy, for nearly twenty years before this litigation was begun and ever since, guarantees title of Bradleys and Young (subject only to the leasehold interests) against all claims for which this litigation could be remedy. The policy shows clearly that this litigation is an act of harassment. (Abst. 30-31, 182)

Summons only to Ellithorpe.

Before consolidation was made, appellant Ellithorpe received summons and filed substantially the same answer, caveat, and cross-petition, as defense to each burnt record petition. After so defending (Abst. 15-25), she sought

consolidation as above stated, to have one litigation and one unit decree for the entire matter, pursuant to section 51 of Civil Practice Act of Illinois. Although that consolidation was ordered by Judge Prystalski (Abst. 30-34), after his death the order was ignored, over protest made by appellant (Abst. 98) against separate Master reports leading to separate decrees. The purpose of Ellithorpe to develop a simple and unit record, has been thwarted ever since, as hereinafter more fully stated. The Supreme Court of Illinois authorized one brief for cases BR 1766 and 1767, which were on appeal Nos. 33326 and 33327, pursuant to its order August 10, 1954. The affidavit for consolidation as made in Circuit Court, is given in full (Abst. 30-33). The just need for unity of litigation is thereby established.

Service of Process Not Made Upon Corporation and 800 Other Defendants (Abst. 153).

The record shows and counsel for petitioners, Bradleys and Young admitted before the Master, that no attempt was made to serve summons upon Lake Dearborn Corporation (record lessee under 99-year leasehold) as provided by Civil Practice Act and Corporation Act, and decisions thereunder, nor upon shareholders, nor upon creditors of Lake Dearborn Corporation, except that Mrs. Ellithorpe was served with summons by the sheriff. The record shows and counsel for petitioners admitted that no attempt was made by Bradleys and Young to comply with relevant sections of the Civil Practice Act; nor with sections of the Corporation Act, nor with section 36 of the Conveyances Act of Illinois, anywhere in this litigation. No evidence was offered that qualified any witness for petitioners Bradleys and Young to make any affidavit as to non-residence, nor unknown owners, nor unknown places of residence, and none of the affidavits provided for by Coveyances Act and Civil

Practice Act, were ever made in this litigation. The only manner of service upon Lake Dearborn Corporation and other persons named in publication, was a land title notice without ever sending to any one any copy, published under section 12 of Burnt Records Act. Publication began January 22, 1947 (Abst. 29); but the summons were not returned until long afterwards (Abst. 25). That notice by publication does not mention shareholders, nor stockholders, nor creditors of Lake Dearborn Corporation, nor numerous other persons or classes, which are disclosed by the petitions of Bradleys and Young, to be necessary parties defendant to said litigation. And said persons are not named by the parties defendant paragraphs to any burnt record petition. Thruout the proceedings, Mrs. Ellithorpe has objected generally and specifically that many necessary parties have not been brought before the court in any manner, and that the cases were never ready for trial or later action by the court (Abst. 12, 27, 149-158).

Special emphasis is placed upon return by Sheriff of Cook County that he had no instructions to serve and did not serve Lake Dearborn Corporation (Abst. 26-27). Bradley and Young stated by pleading (Abst. 8-9):

> "Lake Dearborn Corporation a Corporation of Delaware. This corporation was formerly authorized to do business in Illinois, but such authority has been terminated. Said Corporation is still in existence under the laws of the State of Delaware, and its residence is c/o Secretary of State, Dover, Delaware."

Before the Master, Ellithorpe proved by official public records, that no summons nor any notice of any kind, ever had been served upon or known to the Secretary of State of Illinois, nor upon Secretary of State at Dover, Delaware (Abst. 189).

Nature of the Pleadings.

Each burnt record petition seeks to have "chain of title" recorded and confirmed as a fee simple title absolute. However each petition states:

> "that no one, excepting tenants claiming directly under your petitioners, is in possession of said real estate, or any part thereof—." (Abst. 2, 131).

Each petition asserts that all public real estate records in Cook County were destroyed by fire October 8 and 9, 1871. And continues:

> "seventh: Your petitioners (Bradleys and Young) allege and charge that although the following named persons may claim some right, title or interest in or to said real estate, nevertheless the following named persons have no right, title or interest, in and to said real estate, or any part thereof (Abst. 3). • • •
>
> "Lake Dearborn Corporation, a corporation of Delaware. This corporation was formerly authorized to do business in Illinois but such authority has been terminated. Said corporation is still in existence under the laws of the State of Delaware and its residence is c/o Secretary of State, Dover, Delaware.
>
> "The shareholders of said Lake Dearborn Corporation, and the judgment and decree creditors if any, of said stockholders. Petitioners do not know the names of said parties and their names cannot, upon diligent inquiry, be ascertained by your petitioners. Said parties are hereinafter included within the description 'All Whom It may Concern'. The residences of such parties is unknown to petitioners and cannot, upon diligent inquiry, be ascertained." (Abst. 8-9) • • •

Counsel for Respondents before Illinois Courts urged that burnt record cases proceed upon blunderbus petitions and need not specify what interests of defendants are sought to be destroyed by the proceeding. Such argument

ignores the pleading bottom upon which all courts of record proceed, ignores the Illinois Constitutional provision for uniformity of procedure in all courts, ignores that section 18 of original and present burnt record act provides as to tax deed claimants the burden is on them to plead and prove their claims, and ignores common sense. There are no tax deeds in this litigation. But Counsel for Respondents rely exclusively upon) tax deed cases for their fallacious argument.

Counsel for Respondents before Illinois Courts also urged that as Mrs. Ellithorpe was summoned, she had no concern what was done as to any other defendant. We have shown otherwise by citations herein (page 31). Furthermore after Respondents wilfully compelled dismissal without prejudice from this record, of answer, *caveat* and cross-action herein by Ellithorpe (page 14) and she was forced to present those matters to Superior Court as No. 47S18083; thereafter Mrs. Ellithorpe as actor had the positive duty to protect that litigation from spoliation here by decree. She preferred this forum; but was denied a hearing by the circuit court.

Failure to name defendants.

At paragraph tenth (Abst. 12 and 13) some claimants adverse to the petition are named including "Lake Dearborn Corporation" and "All Whom It May Concern". But said party paragraphs to the petitions, do not mention stockholders, shareholders nor creditors of Lake Dearborn Corporation (Abst. 12, 13). And they are not mentioned in the Land Title Publication notice (Abst. 27). The prayer and affidavit to each burnt record petition is general (Abst. 13 and 14). Ellithorpe made motions to strike the affidavits for insufficiency (Abst. 95-96). Those motions should have been sustained, but were overruled.

Answer etc., by Ellithorpe.

The answer, caveat and cross-petition filed to each petition, by Mrs. Ellithorpe on February 24, 1947 asserts her pleading

> "—to be recorded as her claim and lien against the real estate mentioned in this suit * * * She pursues the full benefit of that record and those facts and that lien with reference to the real estate described in (each) burnt record proceeding" (Abst. 20)

Many details of claim are set forth by Ellithorpe in her Answer and cross-petition. The prayer of her pleading is as follows (Abst. 21):

> "Evelyn Pratt Ellithorpe asks that Katherine W. Bradley and all parties to the proceeding shall make answer to this cross-petition; that this claim for lien be heard and awarded to her; that she may have complete discovery as to all matters therein mentioned; and that she may recover the same by personal judgment and by decree of foreclosure or other appropriate relief in this suit."

Order for Severance—Without Prejudice.

In each burnt record case, petitioners made motion to strike and dismiss the answer and cross-petition by Ellithorpe, and they said:

> "4 This Court has no jurisdiction in this proceeding to hear and determine any of the issues sought to be raised by said pleading". (Abst. 26).

By an order June 17, 1947 the Circuit Court sustained that motion by petitioners (Bradleys and Young) and entered an order including these words (Abst. 35):

> "That the answer and cross-petition by Ellithorpe for an accounting and lien in chancery be and the same is hereby dismissed as to said plaintiffs and counter-defendants (burnt record petitioners).

"It is further ordered, adjudged and decreed by the court that the dismissal of the said answer and cross-petition by Evelyn Pratt Ellithorpe for an accounting and lien in chancery, shall be without prejudice to the assertion by the said Evelyn Pratt Ellithorpe of claim for lien or and accounting in a separate and distinct legal proceeding, and without prejudice to any defense whatever plaintiffs and counter-defendants may see fit to make in any such separate and distinct legal proceeding" (Abst. 35).

Pursuant to that order Ellithorpe filed her suit 47S18083 in Superior Court of Cook County, which remains pending (Abst. 205-232), based upon the factual claims which by said order for severance had been dismissed from this present litigation without prejudice.

That dismissal without prejudice for want of jurisdiction, of necessity carried with that caveat, answer and cross-action, the complete rights and interests of all persons who would be made defendant thereto.

That partition and accounting suit 47 S 18083, made to be defendants, the Bradleys and Young, Farr and Chinnock, and all persons who were the shareholders of Lake Dearborn Corporation when that corporation became incompetent and defunct. (Abst. 212-232).

Denial of Plea in Bar—Former Decree.

Thereafter Ellithorpe filed her plea in bar to burnt record petitions, in the Circuit Court of Cook County, relying upon reorganization of corporation decree under federal bankruptcy laws in United States District Court at Chicago No. 56924, wherein the Lake Dearborn Corporation was organized by order of the United States District Court, and was placed in title of the leaseholds over the parcels of real estate herein concerned, by decree entered

December 16, 1936; as a complete and final adjudication and *res adjudicata* as to all title matters prior to that date. This plea in bar filed by Ellithorpe, defense after separation order, relied upon and fully complied with, the terms of rule 13 of Supreme Court of Illinois. (Abst. 37-38) (compare Abst. 214-218).

Burnt record petitioners (Bradleys and Young) presented motions in writing to strike that plea in bar by Ellithorpe; and she filed a countermotion to carry back their motion to their own petitions. (Abst. 40 and 41). The court then ordered said plea in bar to be stricken as no defense in this litigation. These are federal questions.

Such ruling is defiance of ruling made by your Honors in case of *Stoll* v. *Gottlieb,* 308 U.S. 165, 59 S. Ct. 134; and many other decisions during the decade 1935-1945. Special mention is made of *Re Cloisters Building Corporation,* 296 U.S. 657, 56 S. Ct. 382, 79 F. 2d 694.

Denial of Plea of Statute of Limitations.

Mrs. Ellithorpe then filed against the burnt record petitions, her pleas based upon the Illinois Statutes of Limitation; asserting as her complete defense the five-year and seventy-five year statutes of limitation. Both statutes were stated to be applicable because the Chicago fire of October 8 and 9, 1871, had occurred more than five and more than seventy-five years before burnt record suits were filed, on January 21, 1947. (Abst. 42-43)

Burnt record petitioners made motion to strike that plea based upon statutes of limitations, stating by their motion that— (Abst. 44):

"The said pleading states no defense to the Petition in this case." That motion on that ground was sustained by order of Circuit Court (Abst. 44).

Such ruling is defiance of decision by your Honors in case of *O'Brien* v. *Wheelock,* 184 U.S. 450 at 493-94.

Plea of laches overruled.

Ellithorpe also filed her pleas of laches and want of jurisdiction, stating fully adequate grounds therefor (Abst. 45 and 46). Petitioners filed their motions to strike that pleading and stated that said purported pleading fails to state any defense to this suit. That motion to strike was sustained by order of Circuit Court May 12, 1948 (Abst. 46 and 47).

Such ruling is defiance of ruling made by your Honors in case of *O'Brien* v. *Wheelock,* 184 U.S. 450 at 493; and *Whitney* v. *Fox,* 166 U.S. 637 at 647.

Warner v. *Gosnell,* 8 Ill. 2d 24 at 36, sustains a plea of laches, under circumstances that require a reversal of all decrees on this litigation record.

Motions to vacate and reverse denied.

Ellithorpe filed motions to vacate and reverse the prior orders that were adverse to her pleadings, and supported the motions by full length affidavit showing adequate cause (Abst. 48-50). The motions to vacate were overruled by Circuit Court, and Ellithorpe was ruled to answer.

Plea of Dissolution of Corporation.

Pursuant to Section 54 of Civil Practice Act of Illinois, Illinois Revised Statutes, Chapter 110, Ellithorpe then filed a pleading entitled "Suggestions as to Dissolution of Lake Dearborn Corporation". She asserted thereby the devolution of title to the 99-year leasehold of said real estate to Ellithorpe and other former shareholders of Lake Dearborn Corporation. Thereby request was made

that burnt record litigation abate pursuant to the various mentioned sections of Illinois Statutes. The petitioners filed to that a motion in the alternative, and Ellithorpe filed her motion for dismissal for failure of petitioners to comply with section 17 of burnt record act (Abst. 53-55). The Circuit Court overruled all the motions and allowed the Suggestions to stand as an answer. Bradleys and Young then filed their reply to that pleading as an answer (Abst. 55).

Special motion for dismissal.

Ellithorpe filed motion for dismissal on various grounds (Abst. 60). That motion was denied and the cause referred to Master in Chancery (Abst. 61).

Bradley's Amendment to Pleadings.

After hearings before Master for more than a year, petitioners on June 2, 1950 sought and obtained leave to file Amendment to Petition (Abst. 62-80). Ellithorpe filed answer to amended petition (Abst. 80-84). Bradley petitioners then asked leave and filed their reply (Abst. 86-95). All these pleadings were sent to the Master under the former reference.

Default after Amendment, without Notice to Defendants not Summoned.

Bradley petitioners admitted (Abst. 87) that their amendment vacated all former orders of default; and they sought a new one July 7, 1950, without any manner of notice to any defendants who had not appeared. Counsel for Ellithorpe opposed that motion and order therefor, for want of due process, want of notice, and want of foundation in the record. The hearing on that matter (by emergency judge

during summer recess) is given in full at Abstract pages 135-143. No order for default was ever made against your Petitioner Ellithorpe.

Motion to quash and dismiss.

Counsel for Ellithorpe gave notice for petitioners Bradley and Young to produce proof as to ages and minority of any persons named as minors; and also filed interrogatories to be answered in writing, and motions to quash process and dismiss all litigation. These were referred to Master by order January 2, 1952 (Abst. 94-97, 194-195).

Protesting the reference and procedure, as then and thereafter stated, Ellithorpe attended hearings before the Master, with reluctance and repeated objections to jurisdiction. (Abst. 168-170, 146, 152, 153, 160, 179, 187, 199).

Written Objections to Master's Report.

At conclusion of evidence and argument before the Master, he recommended decrees for burnt record petitioners in each case separately. He overruled all objections that were filed to his reports (Abst. 98-105). The same objections were made against the entire litigation. These objections renewed all pleading defenses set forth above, and renewed also all objections made at the hearings before the Master, upon constitutional grounds, and raising federal questions. Specific objection was made about "Judicial Notice." (Abst. 104 items 18-20)

Written Exceptions before Circuit Judge.

These objections stood as exceptions before the court and additional exceptions were filed to his reports and recommendations (Abst. 98-107).

By order November 20, 1953, Circuit Court overruled all exceptions. Final decree was entered January 8, 1954 upon the reports by Master (Abst. 107-134). No evidence was ever heard before any Judge.

Notice of Appeal—Orders on review.

Ellithorpe filed Notice of Appeal and took other action to preserve the record and perfect appeal (Abstract 134ff), to the Supreme Court of Illinois. The appeal was duly filed in that court.

The Supreme Court of Illinois (without opinion) by order dated November 16, 1954, transferred the litigation to the Appellate Court of Illinois, First District, stating as reason, "that this case was wrongfully appealed" to The Supreme Court of Illinois. Appellant at once served notice to file Petition for Rehearing, but the Clerk of the Supreme Court of Illinois, refused to receive or file the same, stating as reason, that without opinion by the Supreme Court, there could not be a rehearing. Appellant insists that was oppressive action, and a clear failure to apply equal administration of law, pursuant to the Constitution of the United States. There is greater reason for rehearing when there is refusal to write an opinion.

Those refusals by Supreme Court of Illinois, have no basis in published nor written rules of court. On the contrary, section 21 of chapter 37 Courts, Illinois Revised Statutes, provides as follows:

> "In the decision of cases submitted to the Supreme Court, the opinions of the justices shall be delivered in writing, and filed with the other papers. Such opinions shall also be spread at large upon the records of the court."

Ellithorpe protesting the order of transfer by Illinois Supreme Court, the litigation then was filed in the Appellate Court of Illinois, where by opinion filed and order entered October 31, 1955, that Court by one opinion (Appendix B) affirmed the decrees entered January 8, 1954, in the Circuit Court of Cook County.

Ellithorpe filed and presented her Petition for Rehearing to review that opinion, (appendix B). The Appellate Court denied rehearing November 16, 1955. An order was entered to stay the mandate in the Appellate Court. (Abst. 233)

The Appellate Court of Illinois had held the litigation under advisement from its order February 28 until October 31, 1955. If that Court had waited seven days longer to file its Opinion, or had considered the Petition for Rehearing for seven days, Appellant would have filed her appeal of right on January 2, 1956, pursuant to amended statute, section 74 (3) and 75 (1) of Civil Practice Act of Illinois, and Rule 32 (3-5) by Supreme Court.

Under these special circumstances, Appellant asked that Supreme Court of Illinois would rule this application to be an appeal of right, in accordance with said statute, passed by the Legislature of Illinois on July 10, 1955, and the new rules; all in full force before the first term at which this Appeal could be heard. But the Supreme Court of Illinois refused to do so, and denied any hearing. See Transcript, order March 15, 1956. (Page 2 above).

The Record Now Before This Court Presents only legal Federal Constitutional Questions.

By the denial and overruling of said twelve defenses above shown by Ellithorpe, the Illinois Courts have decided only final questions of law. *Whitehall* v. *Alexander*, 229 F. 2d 47. (Abst. 81, 96, 100, 104). Counsel for Respondent so stated before Illinois Courts.

Defense (page 17) Dissolution of Lake Dearborn Corporation, is not an exception to that status. Although Bradelys and Young made reply to that defense; they did not contest nor dispute at trial before the Master, any of the documentary evidence produced by Ellithorpe from public records. That official proof fully established the completion of that dissolution long before the beginning of this litigation. (See pages 27, 54 below)

By Illinois Statute (Chapter 110, Section 43(3))" "An answer containing only defenses to jurisdiction of the subject matter or in abatement, does not constitute an admission of the facts alleged in the complaint, counterclaim or third party complaint."

Contrary to that positive statute, and contrary to practice in historic chancery courts which by constitution is law in Illinois, the Opinion by Appellate Court says this:

> "Appellant (Ellithorpe) failed and refused to file any pleading which denied the facts alleged in the petitions (pleadings by Bradley and Young). A decree entered in a Burnt Record proceeding to establish and confirm title is binding upon persons properly made defendants."

We insist that is downright departure from established procedure shown by said statute Section 43 (3).

That Opinion by Appellate Court also say:

> "Appellant's only claim with respect to the real estate described in the petitions (pleadings by Bradleys and Young) is that she had a lien against it. Under the provisions of the statute under which the proceedings were filed the court had no jurisdiction to determine questions with respect to liens. * * * A decree entered in a Burnt Record proceeding to establish and confirm title is binding upon persons properly made defendants. The chancellor was right in entering the decrees and they are affirmed".

By that general language a defendant summoned is forbidden to defend on the merits, but may be concluded by the decrees. The request for saving clause to show exclusion of all matters set out by Ellithorpe, *caveat,* answer and cross-petition (Abst. 15-25); dismissed on motion by Bradleys and Young (Abst. 26) by court order (Abst. 34); and (Abst. 50, 206-232) pending in Superior Court case No. 47 S 18083, was refused by circuit, by Appellate and by Supreme Court of Illinois. (Abst. 98, 99, 104, 105, 133)

We urge that is denial of primary justice under federal and state constitutions.

The decrees are merely fiat.
Jurisdictional Facts Not Shown.

Petitioners Bradleys and Young did not offer any proof there had been any Chicago Fire; nor that any public records were destroyed by fire; nor that any private records nor documents were destroyed by any Chicago Fire; nor that any private real estate records nor papers nor documents as to petitioners real estate, are missing, lost, destroyed nor otherwise unavailable for use.

Although counsel for petitioners Bradleys and Young, stated on the record that these are jurisdictional facts, required by burnt record act to be proven as foundation for every burnt record proceeding, nevertheless, to all such jurisdictional facts, petitioners Bradleys and Young merely asked that the Master take judicial notice of the Chicago Fire and of the destruction by burning of all such records (Abst. 187, 146). Thereby the decrees have no factual foundation, by any evidence produced. The decrees are mere fiat. (Abst. 112,, 145, 202)

Burnt Record Statutes of Illinois.

These burnt record statutes were enacted by the legislature of Illinois April 9, 1872; to apply—

> "whenever it shall appear that the records or any material part thereof, of any county in the state, have been destroyed by fire or otherwise" etc.

Since that time there have been fires at court houses in some counties of Illinois; but no such fire has occurred in Cook County since that law was made.

Cook County (including Chicago) has millions of human population, and hundreds of thousands of parcels of real estate. But no burnt record proceeding appears on the docket of circuit court of Cook County, during nearly twenty years before this litigation was filed January 21, 1947. And no later burnt record case has been filed. The bar and the bench alike, regard such proceedings as obsolete all those years. Some of the reasons for this, are the statutes of limitation of Illinois.

Seventy Five Year Limitation Statute.

This statute was enacted by the legislature of Illinois and approved July 15, 1941. It provides in great detail that no manner of claim nor document whatever, which is more than seventy five years of age can—

> "be considered to be evidence or be admissible in evidence to be held or urged to make any title unmarketable in part or whole, or be required or allowed to be alleged or proved as a basis for any action at law or in equity, or any statutory proceeding affecting directly or indirectly the title to such real estate".

In this record the Illinois Courts by an act of judicial notice, seek to do what by the statute, all manner of evidence whatever, is forbidden to do. Page 16 above.

Failure to Produce Evidence as to Title.

No records nor copies of documents nor records were offered as to title prior to year 1942, but Harold Young from Chicago Title and Trust Company, gave testimony that he had compared a chain of title prepared for each proceeding by fellow employees at Chicago Title and Trust Company, with the petitions as filed, for the period prior to July, 1926, and stated that they agreed as to sequence of title as source of title for petitioners; but that he and his firm were not asked to show any transfers from the petitioners. He said on cross-examination that the petitions did not show any transfers from the petitioners and that he and his firm were not asked to check any records nor documents for that purpose (Abst. 103, 175). No other testimony nor evidence was offered nor given for petitioners, as to present title of petitioners, Bradleys and Young, except deeds after 1942, which contain express mention and reservation subject to leaseholds of record. Counsel and the Master specifically stated that under the state of the pleadings and the evidence in the record, that leasehold titles were not before the Master; but the final decree is so worded that counsel for petitioners claim that the leasehold interests are erased by the final decree (Abst. 177, 179, 131, Pars. 4, 5, 6, 134).

False affidavits about knowledge filed for Bradleys and Young.

Witnesses Farr, Chinnock and Bennet Botsford Young, who signed the several affidavits to the pleadings that are only basis for publication notice, all admitted that none of them made any inquiry to qualify themselves to execute said affidavits upon their own knowledge. All they did was to confer with counsel and to read the pleadings so

sworn to by them. They knew there are records available about corporations and stockholder lists, but none of them made any inquiry nor examination of the same, before they signed and swore to such affidavits and pleadings on the record. None of the affidavits required by Civil Practice Act of Illinois were ever made. Chinnock admitted he owned stock in Lake Dearborn Corporation, and held in escrow since 1942; one thousand shares of its corporate stock. Chinnock as such stockholder and as such escrow holder, was never made a party to this litigation. Even at the trial appellees made no effort to prove who were named by the stock certificates as shareholders. (Abst. 186, 189). Boldly in breach of trust, his firm ignored their duties as escrow for stockholders. Instead they gave instructions to the attorneys to proceed with burnt record proceedings, without inquiry for corporate affairs (Abst. 186, 149-158).

By exhibit (page 230 of Abstract) prepared and furnished by Witnesses Chinnock and Farr as joint trustees and joint agents for both the lessee, Lake Dearborn Corporation, and for owners of the reversion who are petitioners in this litigation, it is shown that Farr and Chinnock paid for stationery for letters to stockholders of Lake Dearborn Corporation; and therefore had means of access to the lists of stockholders at that time. Such action collides with their affidavits made in this litigation as to their lack of knowledge. What they did know charges them with knowledge. *Reed* v. *Eastin*, 379 Ill. 586; *Miller* v. *Bullington*, 381 Ill. 238; Section 35 of Civil Practice Act and Rule 15 of Supreme Court of Illinois requires personal knowledge by those who make affidavits. Likewise Section 23 of Burnt Record Act. *Harding* v. *Fuller*, 141 Ill. 303.

Sham, Fraud and Evasion.

Exhibits at Abstract pages 229 and 231 show an accounting by Farr and Chinnock upon "Dearborn-Lake Rent Assignment". They made that to Lake Dearborn Corporation, and stockholders, and to the owners of the reversion after leasehold. Said owners, Bradleys and Young, are petitioners in this litigation. Thereby a fiduciary relation is established under said assignment of rents made by Lake Dearborn Corporation. So far as record shows to date, and now the fact is that, said trust and fiduciary relationship continues without change to this date. Thereby petitioners as owners of the reversion, and their agents Farr and Chinnock continue to be fiduciaries and trustees of the leasehold income for benefit of shareholders of former Lake Dearborn Corporation. (Pages 2, 6, 11 above).

The certificate by Secretary of State of Illinois which revoked the right of Lake Dearborn Corporation to do business in Illinois, (Abst. 190) was issued November 15, 1945 and recorded in Cook County, February 16, 1946. The caveat by Mrs. Ellithorpe was recorded in Cook County December 28, 1945. The deeds to petitioners which are made expressly subject to leaseholds of record (Abst. 32) were recorded July 25, 1942, August 31, 1944, and February 25, 1946 (Abst. 206 and exhibits in envelopes). Petitioners Bradleys and Young ignored that deed record, by all their pleadings.

The burnt record petitions which began this litigation, were filed later on January 21, 1947. Petitioners did not mention and did not plead nor prove any disposition of leasehold interests. But the severance order June 17, 1947 operates to remove from Circuit Court record all matters relating to caveat, answer and cross-petition filed by Mrs. Ellithorpe, which include all matters of leasehold interests.

The Master stated that leasehold matters were not before him (Abst. 179) but counsel for petitioners Bradleys and Young continue to assert that decrees affect the leaseholds.

That assertion compelled Ellithorpe to take this appeal. Such assertion by attorneys for Bradleys and Young, render unsafe for Ellithorpe, all the decrees entered in this record. Such assertion is slander upon title of Ellithorpe under the severance order June 17, 1947 and separate suit No. 47 S 18083 in Superior Court of Cook County, for lien on Bradley and Young reversion, accounting and partition of leasehold upon the same real estate. (Abst. 212-232)

Forbidden Conflicting Interests.

The conduct of Messrs. Farr and Chinnock shown by the record (Abst. 149, 164-166, 180, 186 and elsewhere); to be realtor brokers, to own stock of the lessee Lake Dearborn Corporation (later defunct), to hold in escrow other stock of that Corporation, for benefit of Corporation and its stockholders, to be property managers for said real estate, and to be directors of this litigation, signing affidavits without inquiry and the necessary investigation; and in addition to exercise financial fiduciary relation to stockholders and owners (Abst. 212-232): presents a complexity

of relations to people and property, that is forbidden by all American equity courts. Your Honors granted certiorari and struck down a similar wrongful domination of property and people, in the case of *Woods Trustee* v. *City National Bank and Trust Company and others,* 312 US 262. Also—

At May Term 1956 in case of *Flynn* v. *La Salle National Bank and others,* docket No. 33646, the Supreme Court of Illinois accepted jurisdiction, and reversed decree by Circuit Court of Cook County. In that case the same Messrs. Farr and Chinnock were dominating another corner major real estate property in Chicago. They had installed themselves in similar complexity of relations to people and property. The Supreme Court of Illinois by its opinion, condemned such conduct by Messrs. Farr and Chinnock, reversed the decree and gave instructions. In the case at bar the Supreme Court of Illinois failed to perform that duty. Ellithorpe now asks Your Honors to review and reverse this record, to rectify unconstitutional discrimination.

ARGUMENT FOR PETITIONER, ELLITHORPE.

The decrees January 8, 1954 are void for denial of due process and denial of equal protection of law, for failure to bring necessary parties before the court by established procedures, and for departures from basic requirements of federal and state constitutions.

The constitutional and other questions which are involved on these appeals, were raised by the pleadings (Abst. 37, 41, 42, 45, 48, 53, 60 and 80); and were carried forward at the trial and argument before the Master and the trial Judge (Abst. 98-107). Important facts about the record are set forth above at page 8 ff.

Brooks v. *Saloy,* 334 Ill. App. 93 at 99 and *Mott* v. *Danville Seminary,* 129 Ill. 403 at 416, rule that title to real estate passes to shareholders upon dissolution of a corporation which held title to real estate. Lake Dearborn Corporation and its shareholders never were brought before the court on this record. See above at page 10. The record shows that Lake Dearborn Corporation lost all right to do business in Illinois November 15, 1945, and became defunct long before these burnt record cases were begun January 21, 1947. (Abst. 189, 205ff) Section 123 of business corporations act. Thereby the shareholders have title, to all leasehold interest and to all right to accounting for all land in litigation.

Illinois Corporations Act provides (157: 123) "Upon the issuance of such certificate of revocation, the authority of the corporations to transact business shall cease." This date was November 15, 1945 (Abst. 189).

On that date Lake Dearborn Corporation lost all authority in Illinois to transact business. And thereby all title to its real estate in Illinois became vested at once in stockholders of that corporation. (See page 17, 30 above).

See *Dillon* v. *Gloss,* 256 U.S. 368 at 376, as to effective date shown by public documents.

Giese v. *Terry,* 382 Ill. 34 at 41, decides that all persons whose rights may be affected by any suit, must be brought before the court as parties, by action of the court on its own motion, or by mention to the court from any party upon the record, before case may proceed to trial. That decision restates the general historic equity procedure. *Shields* v. *Barrow,* 21 U.S. 409 at 411, 17 Howard 130 at 139.

Hauser v. *Power,* 351 Ill. 36 at 39, decides that a decree on the merits must be reversed when it appears that any necessary party has not been brought before the court by lawful process.

Burrows v. *Palmer,* 5 Ill. 2d 434 at 439, decides that in equity litigation such as present record, all contingent beneficiaries are entitled to have and must have opportunity for hearing and relief. Shareholders of Lake Dearborn Corporation are such beneficiaries, who must be brought before the court, to permit or sustain any decree.

Illinois Valley Bank v. *Newman,* 351 Ill. 380 at 385, reversed a decree as void, because affidavit for publication was made too long before filing at court and first publication notice was made. In case at bar the affidavit to petition is not an affidavit for publication, none other was made, and that affidavit to the petition was executed twelve days before filing at court (Abst. 14) although signed and notarized at Chicago, Illinois, where suit later was filed, January 21, 1947. Publication is void for all purposes.

Central of Georgia Railway Co. v. *Wright,* 207 U.S. 127 at 138ff, decides that notice must be required by statute to a tax payer and an opportunity to be heard allowed, in order to constitute due process of law, to defendant.

Barnett v. *Cook County,* 388 Ill. 251 at 255-257, decides that publication like that relied upon at bar, was void because contrary to due process of law under the constitutional provisions.

It stands admitted on this record and all the proof shows, that petitioners made no effort to serve any process to comply with sections of the Corporation Act, and Civil Practice Act, to bring Lake Dearborn Corporation, or shareholders, or its creditors, and many others shown on the record to be necessary defendants, into court.

The constitution of Illinois provides by Article VI section 29 as follows:

> "All laws relating to courts shall be general, and of uniform operation; and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform."

People v. *Bicek,* 405 Ill. 510 at 522, decides that special civil procedures such as petitioners rely upon on this record at bar, are void because contrary to due process of law and equal protection of law under provisions of the constitutions. Those provisions require uniformity of procedure.

Harms v. *Wuerth,* 396 Ill. 73 at 76, decides that an ordinance which requires that all suits for violation of ordinances, shall be heard before the police magistrate, is void for want of uniformity under constitution of Illinois. The same is true of the special publication process relied upon by the petitioners. See above page 11.

Mullone v. *Hanover Bank and Trust Company,* 339 U.S. 306 at 318-320, decides that the special manner of publication notice relied upon by petitioners as process against defendants, is not personal summons process and therefore is contrary to due process of law. Actually the only true meaning of section 12 of burnt record act, is that the clerk gives such notice that a suit has been filed. It is never intended to be personal summons process. Page 11 above.

What is necessary as basis for jurisdiction by affidavit and publication notice is decided by *Graham* v. *O'Connor,* 350 Ill. at 40ff. The requirement of due inquiry, good faith and sincere effort as there defined is not fulfilled by any action on this record, by affiants for Bradleys and Young as burnt record petitioners. Page 25 ff above.

Craig v. *Sullivan Machinery Company,* 344 Ill. 334, decides there is basic need to serve a resident corporation with personal summons. There was no attempt on this record to serve Lake Dearborn Corporation, by summons at any time. (Abst. 25-26). Page 11 above.

The decrees at bar are void as to all persons other than those served with summons process. There are about 800 stockholders, who were never served. Some of whom are living in Illinois. The record nowhere shows how many of them live outside of Illinois. Section 16 of burnt record act says the decrees are void if personal service has not been made. (Abst. 153. See page 10 above.

Under said constitutions, the decrees January 8, 1954 are void for want of adequate pleading by petitioners. All pleas and motions by Ellithorpe for dismissal are valid and sufficient defenses. All defenses by Ellithorpe should have been sustained and litigation should have been dismissed with costs against Petitioners.

Loewenthal v. *Elkins,* 175 Ill. 553 at 555, decides that any destruction of records or other documents of title to realty by fire, must be alleged and proven as jurisdictional facts, to sustain jurisdiction to enter any burnt record decree. (See above page 23).

The pleadings for petitioners do not allege that any title documents, abstracts or guaranty policies, which they or their predecessors in title did have at any time, are lost, missing, destroyed nor anywise not available for all title purposes. They fail to allege any compliance with Chapter 116, Sections 3, 5, 7, 12, 13, 21, 26, 27 and 28 said petitioners have ignored the requirements of all those portions of the burnt records act. Although they made amendment to their pleadings July 7, 1950, long after trial and argument were pending before the Master (Abst. 169).

Powell v. *Powell,* 335 Ill. 533 at 538, decides that petitioners have chosen wrong procedure. The rule of law is that a court of equity will not aid a forfeiture of real estate, but leaves the parties to pursue an action of ejectment, which is the exclusive remedy to accomplish any forfeiture of real estate. *Hill* v. *Hinman Avenue Co.,* 365 Ill. 129, 182 N.E. 2d 399 at 404, confirms that rule of law.

The five year and the seventy-five year statutes of limitation are directly applicable to this record. All proceedings should have been dismissed pursuant to the pleas therefor by Mrs. Ellithorpe (Abst. 42). Her various mo-

tions for dismissal and her pleas of laches and want of jurisdiction show equally good grounds for like dismissal. Likewise her pleas in bar for former adjudications. (Abst. 15, 37, 41, 42, 45, 48, 53, 60 and 80).

Miller v. *Siuichi,* 8 Ill. 2d 362.
O'Brien v. *Wheelock,* 184 U.S. 450 at 493-4.
Trustees of Schools v. *Botdorf,* 6 Ill. 2d 486; 130 N.E. 2d 111.
Livingston v. *Myers,* 6 Ill. 2d 325 at 336.
Stoll v. *Gottlieb,* 305 U.S. 165.
Gage v. *Du Puy,* 127 Ill. 216, 19 N.E. 878.

The decrees January 8, 1954 are void for want of adequate evidence to support any decree, and void for reliance upon judicial notice of events for which no foundation was laid. (Abst. 104 items 18-20 and others)

Exhibits in evidence from the Superior Court Case (Record 229ff) show unsettled accounts as to leasehold estates, and thereby establish an affirmative defense against clearance of title. Those accounts are pending in Superior Court of Cook County, as part of case No. 47 S 18083.

As shown above at page 10 petitioners never complied with Section 36 of Conveyance Act and other statutory requirements as indispensable basis for presenting evidence in this litigation also at page 23 and ...., it is shown that petitioners never established any basic facts to invoke the jurisdiction of any court in any burnt record case. When petitioners asked the Master and the Court to take judicial notice of the fundamentals of their cause of action they depart from the very nature of judicial notice, which is merely a branch of the law of evidence.

No court can invest itself with jurisdiction of subject matter of a statutory cause of action, by sheer assumption.

> "It seems to be assumed that the court in striking the objections from the files, took judicial notice of some alleged facts, but the doctrine of judicial notice is a branch of the law of evidence, and authorizes the court, whenever a fact is material, to take judicial notice of the fact; but it must be presented to the court in some manner, and not by demurrer or motion to strike. The judgment of the County Court is reversed and the cause is remanded." *People ex rel.* v. *Keokuk and Hamilton Bridge Company*, 287 Ill. 246 at 250. Objections to taxes had been stricken.

Cloak of Judex but power of imperium.

Usual court action by "judicial notice" dispenses with evidence about what is generally known by current generation of people. Such action assumes truth of subsidiary and marginal matters of common fact. Such action reaches no further than a reasonable presumption *prima facie,* as to some phase of the case. Opposing parties may meet such court action and defeat it by evidence of countervailing facts and by cross examination of witnesses. But the act in this record which is labeled "judicial notice" is not of that character.

Imperium wearing the cloak of judex, here has usurped control of the litigation and the final result. The facts assumed by court on this record are not merely evidentiary and *prima facie;* but are the basic jurisdiction and cause of action, provided by statute and thereby required to be proven by evidence. The court cannot be cross-examined. There cannot be countervailing evidence when the court pontificates conclusively 1) that the Chicago fire occurred; 2) that all public deed records were destroyed by that fire; 3) that all private title papers and records of Bradleys and Young were destroyed by that fire; 4) that Bradleys and Young have no abstract of title. (Appellate Opinion, appendix A)

Bradleys and Young did not plead any burning, loss, nor destruction of their private deeds and records as to title to the real estate. But on the contrary, the sworn answers by Bradleys and Young (Abst. 91-92) to interrogatories filed by Ellithorpe, establish that the Bradleys and their Trustees, reside at Dubuque, Iowa, Los Angeles, California and Lowell, Massachusetts. The normal presumption must be that all private title papers for said real estate, have been and are kept outside of Illinois.

Furthermore, Farr as witness for Bradleys and Young, testified (Abst. 192) that none of them lived in Chicago at time of Chicago Fire, nor at any time since.

Not only is the "judicial notice" unconstitutional reach for power, but it is contrary to positive evidence that Bradleys and Young produced.

Section 18 of Chapter 116 (burnt records act) provides for decree "upon proof of the facts stated in the petition". Judicial notice of the jurisdictional facts would be a plain defeat for the statute, and openly unconstitutional.
15 RCL, as to judicial notice says:

> "But the courts should not take judicial notice of such facts as are not matters of general history. And a party relying upon historical facts concerning individuals or mere local communities, must produce some evidence thereof to the jury." Page 1092. "Judicial notice of such facts takes the place of evidence and is of equal force. It displaces evidence since it stands for the same thing." Page 1056.

Under the law the jurisdictional facts and all matters are forbidden to become subject for judicial notice in relation to present litigation. The decrees are clearly void. They are forbidden by constitutional law, and they deny justice. (Abst. 104, items 18-20)

Equity abhors forfeitures and leaves parties as they are. Without pleading therefor and without evidence, and without process as to most defendants, petitioners seek without any payment to seize upon 99-year leasehold and building which they authorized upon their lot parcels. They seek silent confiscation, without foreclosure, without ejectment action, contrary to all regular and customary procedures in Illinois, and contrary to equal protection of law under state and federal constitutions. Petitioners have used evasion, sham and fraud thruout the litigation. They compel three suits, where one would be wholly adequate. Petitioners are estopped by their own misconduct at court.

Bradleys and Young seek to evade basic rule of Illinois law, that only an ejectment action may deal with forfeiture of any leasehold or other real estate interest. *Powell* v. *Powell,* 335 Ill. 533 at 538.

Bradleys and Young refused to litigate leasehold pursuant to answer, caveat and counterclaim (Abst. 15-25, 26, 34) in 1947, but in 1954 they present a decree for general clearance of titles (Abst. 11 and 134).

Said petitioners pretend that notice of filing their petitions, under section 12 of burnt records act (Abst. 27) is also personal notice to any defendants named in their petitions as parties. That claim is unconstitutional.

The claim made by petitioners as to meaning and use of Section 12 of Burnt Records Act as summons process, would be void under that section; not only on constitutional grounds, but also as usurpation against powers of the courts under the constitution; which were sustained by the case of *Agram* v. *Checker Taxi Company,* 412 Ill. 145, 105 N.E. 2d 713, and Rule 3 of Supreme Court of Illinois. Actually section 12 provides only for notice of "filing of

the petition''; and has no intention to summon persons or parties to suit. Only the Civil Practice Act deals adequately with that situation, assisted by Corporation act. No attempt was made on this record to comply with the provisions of those procedural laws.

Petitioners pretend that in body of their petition they can mention shareholders and creditors and other persons; but do not need to name them as parties in the parties paragraphs (Abst. 8, 12). (See page 13 above).

Petitioners pretend that they can ignore provisions of the Civil Practice Act about service of process upon resident persons, about affidavits as to unknown names, or addresses, or persons, and claim they have decrees against all the world. (See pages 10, 25, 26, 27 above).

Petitioners pretend they can ignore provisions of corporation act as to service of process upon corporations resident in Illinois; and still claim a decree binding corporations and shareholders. (Pages 10 above).

Petitioners pretend they can sue a corporation long after its right to do business by holding title to real estate in Illinois has been cancelled by action of Secretary of State of Illinois on November 15, 1945, and the revocation recorded on title records in Cook County, Illinois on February 16, 1946. (See pages 17, 27, 30 above).

Petitioners pretend they can ignore Section 36 of Conveyances Act by failing and refusing to make inquiry and present affidavits as basis for secondary evidence of documents and other papers to be restored; and can ignore rules of Supreme Court about having personal knowledge before making any affidavits for pleadings or process. (See pages 10, 25 above).

Contrary to fundamental principles of equity, petitioners Bradleys and Young seek forfeiture of leasehold by indirection. *Fitzu* v. *Levin,* 399 Ill. App. 391 at 394.

The basic opposition of courts of equity to claims of forfeiture has been shown thruout the history of chancery; and appears by the latest decision on that matter by Supreme Court. *Kingsley* v. *Roeder,* 2 Ill. 2nd 131, 117 N.E. 2d 82ff. The value of petitioners Bradleys' and Young's, land reversion is small in relation to value of 99-year leasehold and 12 story modern commercial building improvements (Abst. 30ff), paid for and constructed by money from shareholders of Lake Dearborn Corporation.

Under said constitutions the decrees January 8, 1954 are void because contrary to res judicata order of severance and divestiture of jurisdiction of subject matter removed by that order, June 17, 1947, which excluded leasehold.

Schuyler County v. *Missouri Bridge Company,* 356 Ill. 348 at 352 and *Ashbraugh* v. *Murphy,* 90 Ill. 182 at 183, decide that a position taken in litigation by one party becomes the law of the case, and he is forbidden and estopped to retrieve any former status.

When petitioners Bradleys and Young by their motion to strike, declared against the Ellithorpe pleading by answer, caveat and cross-petition, that:

> "4 This court has no jurisdiction in this proceeding, to hear and determine any of the issues sought to be raised by said pleading" (Abst. 26).

and presented to the Court their draft for an order to sustain that motion on that ground (Abst. 34): petitioners Bradleys and Young thereby removed from this litigation all matters and issues whatever which could in any manner

arise from any facts shown or suggested by said answer, caveat and cross-petition (Abst. 15-25), from any later or further consideration by circuit court or any other court in this litigation.

Any contention by Bradleys and Young that the order June 17, 1947 for severance and dismissal without prejudice, so obtained by them, as to the Ellithorpe pleadings then in issue, would affect only a lien, is fraudulent and contrary to their written record position so chosen and stated by them before the order for severance was entered. The Bradleys and Young are estopped by their own conduct. Since and forever after said order was entered, they have no right to ask any court to split the factual claim made by Ellithorpe, and retrieve any part of it for the circuit court litigation, after Ellithorpe by said order of severance has been driven by said conduct of the Bradleys and Young, to proceed in Superior Court upon totality of her factual claims, which are indissolubly allied and coupled with property rights of all other shareholders of Lake Dearborn Corporation.

Also said Bradleys and Young filed their answers to said new litigation in Superior Court of Cook County, so filed promptly in that court, conforming and pursuant to said severance order, which had been demanded and obtained by said Bradleys and Young. Such action confirmed what had been done in circuit court as dismissal without prejudice. Any further action in circuit court would be and is prejudice. Thereby all matters and issues in that Superior Court suit, at once became a prior action pending in that court, as to any later proceeding or hearing in the circuit court (Abst. 206ff), in litigation at bar.

Thereby the procedural conduct of Bradleys and Young, has limited the burnt record suits which are this litigation, to exclude what is pending in Superior Court No. 47 S 18083 (Abst. 205-232). Thereby the decrees herein are void as to any matters so severed by circuit court, and by order of transfer so pending in the Superior Court of Cook County. These decrees herein should have said so plainly, as Ellithorpe requested in circuit court (Abst. 99, 105).

Thereby all decrees exceed the scope of record as cut down by the severance order June 17, 1947 (Abst. 35). See above at page.....

Illinois Courts blockade against review by certiorari.

The primary duty is obligatory on all courts, both state and federal, to hear and determine constitutional questions and federal questions, which are presented by record.

Article VI (second paragraph) Constitution of United States.

Ruth Elaine Allendorf v. *E. J. & E. Ry. Co.*, 8 Ill. 2d 164 at 168—133 N.E. 2d 288 at 290.

Conway v. *Cable*, 37 Ill. 82 at 90.

West Chicago Street Ry. Co. v. *Illinois ex rel. Chicago*, 201 U.S. 506, 519 ff.

Coombes v. *Getz*, 285 U.S. 434.

By Article VI, Section 12 of Constitution of Illinois,

"The circuit courts shall have original jurisdiction of all causes in law and equity"

and by Section 1 of Chapter 22 of Illinois revised statutes together with rule 11 by Supreme Court of Illinois, they do so,

"according to the general usage and practice of courts of equity."

The opinion by Appellate Court in this litigation says:

> "We shall not discuss the constitutional questions urged as points 1, 2 and 5 of her (Ellithorpe) brief."

Those "points 1, 2 and 5" are the same matters which are urged by this petition for your Writ of Certiorari.

Under the constitutions and statutes, such action by Appellate Court of Illinois and like action by the Supreme Court of Illinois, is denial of primary property rights, by judicial abdication. It is also refusal to prepare the record for review before this Supreme Court. Such adverse refusal by Illinois Courts, operates to blockade the road to review by this Supreme Court. The dangers of judicial discretion are well stated by Mr. Justice Douglas, *United States* v. *Wunderlich*, 342 U.S. 98 at 101. Compare the petition for rehearing at Appendix C.

In the *Allendorf* case (8 Ill. 2d 164 at 168) the plaintiff relied upon Article VI second paragraph of the Constitution of the United States. The appeal was taken upon the ground that said Article VI did not apply to that case. The Supreme Court of Illinois accepted the jurisdiction on that constitutional ground. They decided that Article VI did apply. And they affirmed the judgment.

In the case at bar there was refusal to apply Article VI. And the Supreme Court of Illinois refused to take jurisdiction, on direct appeal and again upon petition for leave to appeal, duly presented by Ellithorpe.

Comparison of the *Allendorf* case with the present record, clearly shows discrimination and unequal application of law and constitution, by the Appellate and Supreme Courts of Illinois.

Griffin v. *Illinois* sustains specific language of bill of rights of constitution of Illinois which repeats magna charta; and also applies due process and equal protection

of laws clauses of Illinois and Federal constitutions to avoid invidious discriminations and to do justice; beyond the piosity of hardship procedure. 100 S. Ct. 483, April 23, 1956. 351 U.S. 12.

The case of *Nashville, Chattanooga and St. Louis Railway Co.* v. *Walters,* 294 U. S. 414 at 416; 55 S. Ct. 483 at 488, reversed the courts of Tennessee, because they had refused to reexamine present status of an old statute. Your Honors reasoned as follows:

> "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied".

The case of *Brown* v. *Western Railway Company of Alabama,* 338 U.S. 294, 70 S. Ct. 105, reversed the courts of Georgia, because a possible federal right had been defeated by forms of local procedure and practice. Your Honors ruled that strict local rules of pleading cannot be used to impose burdens to impede recovery upon federal rights. By that opinion Your Honors referred to and affirmed many former decisions to the same effect.

All these decisions show clear need for your review of present record, by your writ of certiorari.

By overall language and inclusive coverage of circuit court decrees dated January 8, 1954 (Abst. 111, 134): and also by the nature of unit building upon and over all adjoining parcels of land, which are involved in this litgation (Abst. 30-31 and elsewhere) the record shows there are mutual permanent easements among all parcels: which vested the Supreme Court of Illinois with compulsory jurisdiction to retain and decide the appeal taken directly to that court (Abst. 134). Gilbert v. Chicago Title and Trust Company, 7 Ill. 2d 496 at 499.

In this *Gilbert* case, the Supreme Court of Illinois accepted jurisdiction on direct appeal, to reverse and remand, and ruled as follows: (January Term 1956)

> "Plaintiffs appeal directly to this court on the ground that a freehold is involved." 7 Ill. 2d at 499.

Similar respect for present record, would compel that Court to accept jurisdiction on direct appeal, to hear and reverse this record.

> "The history of liberty has been largely the history of observance of procedural safeguards."
> *McNabb* v. *United States,* 318 U. S. 332, 347.
>
> "In the development of our liberty, insistence on procedural regularity has been a large factor."
> *Burdeau* v. *McDowell,* 256 U.S. at 477.
>
> "The right of petitioner is not merely procedural; but also a substantive right of property under the constitution."
> *Potter* v. *Couch,* 141 U.S. 296 at 320.
>
> "The equal protection of laws is a pledge of protection of equal law."
> *State of Missouri ex rel. Gaines* v. *Canada,* 395 U.S. 337 at 350.

> Whenever it is apparent that the state courts sought to evade the real issues presented for decision, this court will make an independent examination of the issues and the facts.
>
> *Craig* v. *Harney,* 331 U.S. 367 at 373.
>
> *Chicago, Burlington and Quincy Railroad Company* v. *City of Chicago,* 166 U.S. 226 at 241.

A parallel refusal by Texas state courts to follow established practice and procedure in that state, was reversed.

Cities Service Oil Company v. *Dunlap,* 308 U.S. 208 at 212.

This Supreme Court there ruled:

> "We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title * * * may confidently rely."

In this litigation Ellithorpe seeks such an independent examination of the case made in her behalf by the record from the trial court.

Urie v. *Thompson,* 337 U.S. 163 at 172, 173 and 196.

Whenever it is apparent from the record that state courts have evaded the real issues presented by the record, this court will make an independent examination of record issues, and will give directions to enforce due process of law and equal application of law as provided by the fourteenth amendment to the constitution of the United States.

Duty of Illinois Courts, under Constitution.

As precedent for our special situation, attention is directed to the case of *City of Chicago* v. *McCausland,* 374 Ill. 34—308 Ill. App. 538—379 Ill. 602. On that direct appeal to Supreme Court of Illinois, there was an order of

transfer April 17, 1940 to the Appellate Court for the First District, upon the statement there was no new constitutional question in the record. A petition for rehearing by the Supreme Court of Illinois was denied June 12, 1940. The cause then was docketed in the Appellate court, which affirmed the trial court, the Superior Court of Cook County. Then a petition for leave to appeal was granted by said Supreme Court, and the case was reheard in that court. The final opinion and ruling by said court in that litigation May 13, 1942, was a reversal of all former rulings, in all three courts. Judgment was directed for plaintiff on the express ground that the error was not merely procedural, but was a denial of rights under the constitution.

In that *McCausland* case the Supreme Court, by adequate hearing and more reasonable patience to understand counsel for appellant at time of direct appeal, would have saved two years of time, effort and expense for two courts and all parties who were concerned on that record. Likewise in the case at bar, reasonable consideration by said court, for the procedural problems thrown upon appellant and her counsel through no fault of their own, would mean a substantial saving of time, effort and expense for all concerned with disposition of this record. Without such fair review, we believe that said Supreme Court of Illinois joins with the circuit court in action that we deem a destructive denial of due process, denial of fair trial, and denial of equal protection of law contrary to federal and state constitutions.

That this record presented matter for immediate review by the Supreme Court of Illinois as preparation for review before the Supreme Court of the United States, appears from this ruling:

> "There have been instances where the court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy has proceeded to a point where a losing party would be irreparably injured if review were unavailable." (citing cases)
>
> *Republic Natural Gas Company* v. *State of Oklahoma,* 334 U.S. 62 at 67ff, 68 S. Ct. 976.

Appellant urges that irreparable injury has occurred. So far as that injury is procedural confusion, and said Supreme Court refused to direct correct procedure, the Appellate Court did deal with the case only as mangled by unconstitutional procedure. Thereby the action by Appellate Court would perpetuate the substantial wrongs shown by record and Petition for Rehearing. We insist that it is the duty of this Supreme Court at once to say that the procedural wrongs that we have shown are unconstitutional. This is just what was done in the *McCausland* case, two years after direct appeal.

Hall v. *Cook County,* 353 Ill. 477—274 Ill. App. 503—359 Ill. App. 528—is another transfer case that was finally reversed by the Supreme Court, on Second Review.

People v. *Dugan,* 401 Ill. 442, sustained the pleading to upset final judgment, upon the ground that due process requires fundamental justice, and is not satisfied by a surface of formal procedure. That opinion referred (page 446) to *Foster* v. *People of Illinois,* 332 U.S. 134 where that court ruled at page 136 (67 S. Ct. 1717):

> "The 'due process of law' which the fourteenth amendment exacts from the states is a concept of fundamental justice. It is not satisfied by merely formal procedural correctness, nor is it confined by any absolute rule" etc.

Parker v. *People of Illinois,* 68 S. Ct. 708, ruled (333 U.S. 571 at 577), that finality to determine constitutional questions exists in Illinois, finally in the Supreme Court. Therefore it appears that immediate review should follow refusal by the Illinois courts to take jurisdiction of this case upon constitutional grounds which are asserted by this record. See discussion 15 A of C Law Review 116.

Public Importance of This Litigation.

The Illinois Courts as shown above (pages 13-20), have ignored at least twelve defenses to this litigation. They have done so deliberately and without any assigned reason known to American law. The rulings were all made with nonchalant indifference to the prior decisions, the statutes and the constitutions, applicable to the well written court record. All twelve defenses are substantial and well founded in procedural law, and equally so in the substantive law. These defense procedures are standard and well known in Illinois. Each such defense by itself is sufficient to warrant dismissal of the entire litigation begun by Bradleys and Young.

As shown in body of this petition, deliberate fraud against petitioner and 800 other shareholders of Lake Dearborn Corporation never notified nor summoned, together with equitable estoppel, unjust enrichment and breach of fiduciary duty all have been boldly abused and flouted, by Bradleys and Young and their land manager at Chicago. If as your Honors often decide, the administration of justice is concerned with values, this record is clear case for your writ and review.

Unless decrees herein are reversed, the property rights of trust beneficiaries and corporation shareholders throughout the United States, are in danger of washout and destruction by the procedural methods used against Ellithorpe in this litigation and condoned by Illinois Courts.

Lake Dearborn Corporation and shareholders and creditors, should have been and must be dismissed from this litigation, upon reversal of decrees which were entered without jurisdiction of them or jurisdiction over the leasehold and corporate interests.

Mrs. Ellithorpe urges that an Indian gantlet of adverse procedures, over her constant protest and objection, have been used herein by Bradleys and Young against her property rights, during ten years of delay and harassment, unlawfully, successively, and contrary to provisions of the constitutions of Illinois and the United States of America; to mangle and defeat her property rights, which are stated by this record. Federal questions are presented as above set forth.

Whether such complaint be new or old matter of grievance before this Court, it is nonetheless important to public order and ownership of trust property and corporate property in the United States. Your petitioner urges that her petition is well grounded in justice and law. She truly merits your careful consideration, and full relief.

Federal Basis for Dismissal of Burnt Record.

Your Petitioner Ellithorpe respectfully suggests, that it would be proper and sufficient disposition of this record, for your Honors to reverse all decrees herein by the Illinois courts, and remand with directions for dismissal of burnt record litigation pursuant to principles and citations discussed above at pages 15 ff., 35 which establish that complete dismissal is fully warranted by former decree of United States District Court in December 1936, statutes of limitation in Illinois, laches of reversion owners, wilful failure to name and summon many necessary parties to suit, want of due process, want of equal protection of laws, want of administration under established laws, want of constitutional and uniformity of procedure, and other un-

constitutional denials and harassment, shown by the record. Your Petitioner calls attention specially to breaches of trust which appear in the record and are shown by table below at page 53 ff.

Prayer for Relief.

Petitioner Ellithorpe submits that she was denied due process of law, and was denied equal protection of law, by the courts of Illinois, as shown by the record in this litigation. Such adverse action merits review and reversal by the Supreme Court of the United States.

Wherefore petitioner prays the allowance of your writ of certiorari to the Supreme Court of Illinois and to the Appellate Court of Illinois, First District; to the end that this litigation be reviewed and decided by your Honors; and for such relief as this Court may direct.

Pursuant to notice of appeal (Abst. 134), Mrs. Ellithorpe asks that all adverse decrees shall be reversed, and that all costs in all courts shall be assessed against Bradleys and Young, who began this litigation in Circuit Court of Cook County.

Respectfully submitted,

WEIGHTSTILL WOODS,
Attorney for Petitioner for Writ of Certiorari.

APPENDIX A.

Time—Events—Litigation.

1926

July 9

99-year leases made for all parcels to one lessee. (abst. 22, 30, 32, 213 ff and elsewhere)

1928

One unit steel and concrete garage building erected on all land. (abst. 30) Title guaranty policy issued for one million dollars. (abst. 30, 31, 182 and elsewhere) Leasehold bonds in sum of one million dollars sold to American public, and proceeds used to pay for erection of said leasehold property. (abst. 214 and elsewhere)

1936

December

Federal district court at Chicago, in bankruptcy reorganization No. 56924, orders new Lake Dearborn Corporation of Delaware to be confirmed as owner of revised leasehold. Former bondholders for one million dollars, are confirmed as stockholders of Lake Dearborn Corporation. All Bradleys and Young interests and their attorneys were parties to that federal reorganization of fee and leasehold. (abst. 37-38, 214-218 and elsewhere)

1942

March 1

Bradleys and Young and their realtor managers, Farr and Chinnock, became trustees under rent-assignment agreement with Lake Dearborn Corporation, then sole owner of the entire leasehold property. (abst. 219-220, 229-232)

1942
July 10

Said Chinnock and Farr and Company received in escrow 1000 shares of capital stock of Lake Dearborn Corporation, for stockholders. (abst. 223-224, 166, 186 and elsewhere)

1942-1943

As such trustees under said rent assignment, Bradleys and Young and their Realtor managers Farr and Chinnock, purport to pay from cash receipts from said leasehold property under rent-assignment, $4.000 to Wilson and McIlvaine as attorneys, and $400 for Lake Dearborn Corporation expenses, and $50 for said Corporation representative in the State of Delaware. (abst. 230-232)

1942 and thereafter

Failure of said Trustees under rent-assignment, to pay Illinois and Delaware franchise taxes, from cash $10.431 trust funds in their hands August 31, 1944 (abst. 232), forced cancellation of franchise of Lake Dearborn Corporation and the dissolution of that Corporation, without notice to Ellithorpe and other stockholders of that Corporation, from said Trustees.

1945 15th November

Secretary of State of Illinois, under statute, cancels franchise and revokes certificate of authority for Lake Dearborn Corporation to do business in Illinois. Notice not given to Ellithorpe and other stockholders, who became owners of leasehold property by devolution of title under real estate laws of State of Illinois. (abst. 53, 189, 190 and elsewhere)

1945 28th
December

Ellithorpe filed with Cook County recorder her lien and caveat. (abst. 15 ff)

1946 16th
February

Secretary of State records in Cook County the revocation of authority of Lake Dearborn Corporation to do business in Illinois. (abst. 190)

1947 21st
January

Bradleys and Young began in circuit court Cook County, this litigation by filing petitions under burnt record statutes. (abst. 1 ff)

1947 22nd
January

Land Title Notice publication began in newspapers. (abst. 27) Stockholders and many other persons not named in publication.

1947 24th
February

Ellithorpe answer-caveat-cross-action, filed in circuit court against Bradleys and Young, all stockholders and other persons. (abst. 15-25)

1947
March 7

Circuit court summons by Bradleys and Young, returned by Sheriff not served on Lake Dearborn Corporation—no instructions to serve. (abst. 25-26)

1947
March 13

Motion by Bradleys and Young to strike answer etc. by Ellithorpe. (abst. 26)

1947
June 17

Upon Ellithorpe motion and substantial affidavit filed, circuit court orders consolidation of all litigation. (abst. 30-33)

1947
June 17

Circuit Court orders dismissal without prejudice, for want of jurisdiction, Ellithorpe answer, caveat, cross-action etc. (abst. 34-35)

1947 8th
November

As case 47S18083 in Superior Court of Cook County, Ellithorpe files complaint in equity, for lien on reversion real estate of Bradleys and Young, for accounting, for partition and sale of leasehold estate etc.: to carry forward the matters dismissed for want of jurisdiction by circuit court June 17, 1947, which order expressly was made without prejudice. (abst. 35, 212-232)

1947-1950

Other pleadings, motions and orders in burnt record litigation. (abst. 36-94)

1952 2nd
January

Motion on constitutional grounds, by Ellithorpe, to dismiss all burnt record litigation in circuit court. (abst. 95-97)

1953 11th
August

Master in circuit court burnt record litigation, files his report of hearings and exhibits, under order March 1949; including objections filed by Ellithorpe January 25, 1953. (abst. 98 ff)

1953 20th
November

All objections and exceptions by Ellithorpe (abst. 98-107) overruled by judge in circuit court burnt record litigation.

1954 8th
January

Judge in circuit court enters final decrees. (abst. 107-134)

1954 7th
April

Ellithorpe perfects appeal to Supreme Court of Illinois. (abst. 134)

1954 15th
November

Without opinion, Supreme Court of Illinois, orders transfer of burnt record appeal to Appellate Court of Illinois. (abst. 233)

1954 24th
November

Supreme Court of Illinois refuses to receive notice for rehearing, presented by Ellithorpe.

1955 28th
February

Burnt Record Appeal under advisement by Appellate Court. (abst. 233)

1955 31st
October

Opinion and order by Appellate Court affirms decree by Circuit Court January 8, 1954. (abst. 233)

1955 15th
November

Ellithorpe files petition for rehearing in Appellate Court. (abst. 233) That petition is denied November 16th, 1955.

1955 31st
November

Stay of mandate ordered by Appellate Court of Illinois. (abst. 233)

1955 23rd
December

Petition for leave to appeal, filed by Ellithorpe in Supreme Court of Illinois, to review the burnt record litigation.

1956
March 15

Without opinion, that petition denied by Supreme Court of Illinois.

1956
June

This Petition for Writ of Certiorari filed at Washington.

APPENDIX B.

Opinion of the Appellate Court.

Mr. Justice Burke delivered the opinion of the court.

Two petitions under the Burnt Record Act were filed in the Circuit Court of Cook County to establish and confirm title to real estate. A decree was entered in each case which established and confirmed title to the real estate in the petitioners. Evelyn Pratt Ellithorpe is the only defendant who took an adversary position. The claim made by her was for a lien and an accounting. The decrees provided that neither the proceedings nor the decrees should affect any lien or liens or claim for a lien or an accounting to which the real estate might be subject. She appealed to the Supreme Court, where the cases were consolidated. The Supreme Court found that the cases were wrongfully appealed to that court and transferred the consolidated appeal to us. We shall not discuss the constitutional questions urged as points 1, 2 and 5 of her brief.

Appellant says that the decrees are void for want of adequate evidence and for reliance upon judicial notice of events for which no foundation was laid. It was proper to take judicial notice of the Chicago Fire. On the 8th and 9th days of October, 1871, the public records of Cook County, including all of the records in the Office of the Recorder of Deeds and all the records of the courts in Cook County were totally destroyed by that conflagration. The Chicago Fire is a matter of common knowledge. It is a landmark in the history of the city. The courts will take judicial notice of that fire and of its destructiveness.

An examination of the record shows that petitioners followed the procedure outlined in the Burnt Record Act. Appellant's only claim with respect to the real estate described in the petitions is that she had a lien against it. Under the provisions of the statute under which the proceedings were filed the court had no jurisdiction to determine questions with respect to liens. Appellant failed and refused to file any pleading making any other claim to the real estate. She filed no pleading which denied the facts alleged in the petitions. A decree entered in a Burnt Record proceeding to establish and confirm title is binding upon persons properly made defendants.

The chancellor was right in entering the decrees and they are affirmed.

Decrees affirmed.

FRIEND, P.J., and NIEMEYER, J., concur.

IN THE

Appellate Court of Illinois

FIRST DISTRICT.

APRIL TERM, A. D. 1955.

BENNET BOTSFORD YOUNG, *Petitioner-Appellee,* *vs.* THE LAKE DEARBORN CORPORATION, etc., et al., *Defendants.*	Appeal from the Circuit Court of Cook County.
KATHERIEN W. BRADLEY, et al., *Petitioners-Appellees,* *vs.* THE LAKE DEARBORN CORPORATION, etc., et al., *Defendants.*	Transfer from Appeal taken to Supreme Court of the State of Illinois.
On appeal of EVELYN PRATT ELLITHORPE.	

PETITION FOR REHEARING.

Within the time allowed by Rule 14, Evelyn Pratt Ellithorpe protests and objects to all action taken by the Court October 31, 1955. She presents her Petition and respectfully states:

A. By its abstract statements and sweeping conclusions, the Opinion by Appellate Court shows forth an absence of due process under the constitution of Illinois and of the United States. The Opinion demonstrates a complete departure from the normal and usual procedure. The Stat-

utes of Illinois provide for an Opinion on review, setting forth concrete reasons for the ruling made by the Court. Chapter 37—Courts, paragraphs 41 and 66. *People* v. *Hassakis*, 6 Ill. 2d, 129 N. E. 2d 9 at 10 ff. In the case at bar, the Supreme Court of Illinois filed no Opinion at all to support the order for transfer. The Opinion by the Appellate Court is more abstract than the record which was denounced for brevity by the Supreme Court of Illinois in the case of *Hassakis*. The Appellate Opinion is judicial assertion without analysis. Thereby Petitioner has been denied equal application of law and equal protection of law, as required by statutes and the Constitutions.

B. The Appellate Court fails and refuses to pass upon any of the constitutional issues which were presented by the record and the briefs. Thereby the Opinion and the affirmance of decrees, ignore the rights of Petitioner, and ignore the positive duty of the Appellate Court, as provided by the supremacy clause at Article VI of the Constitution of the United States.

C. The cryptic Opinion and affirmance of decrees, create a new issue of constitutional law, because such action is a failure to prepare the record by Opinion, for review before the Supreme Court of the United States of America, pursuant to the duty of Appellate Court, under said supremacy clause and under all statutes and rules pursuant thereto.

D. The Opinion and affirmance of decrees, overlook and disregard substantial points presented by the record and briefs, and decide the appeals contrary to the record and the briefs.

E. The Opinion and affirmance of decrees, overlook basic rights of Petitioner, created by the statutes of limitation of Illinois, which statutes are mentioned and applicable to the situation shown by the record (see brief 20 and reply 9). Such Appellate Court action also is con-

trary to recent Court ruling upon companion limitation statute of Illinois. See *Livingston* v. *Myers*, 6 Ill. 2d 325 at 336, 196 N. E. 2d 12.

F. Said Opinion and affirmance of decrees, create another issue of constitutional law, when the Appellate Court asserts power of judicial notice, contrary to statutory legislation, which forbids any form of evidence more than seventy-five years old. See briefs pages 21-22 and reply page 10. Thereby equal administration of law has been denied to Petitioner.

WHEREFORE, Petitioner asks for rehearing and further proceedings under constitutions and the statutes.

Respectfully submitted,

WEIGHTSTILL WOODS,
53 West Jackson Blvd.,
Chicago 4, Illinois,
Attorney of Record.

APPENDIX D.

Constitution of the United States.

Amendment 14, section 1—

"nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment 9—

"The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".

Constitution of Illinois

Article II bill of rights—

Section 2—"No person shall be deprived of life, liberty or property without due process of law".

Section 19—"Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation: he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, without delay."

Article VI—Courts—Paragraph 29—general provisions:

"All laws relating to courts shall be general, and of uniform operation: and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform."

JUN 26 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. [redacted]148

KATHERINE W. BRADLEY and Others,
Trial Court Petitioners,
Respondent here,
and
BENNET BOTSFORD YOUNG,
Trial Court Petitioner,
Respondent here,
vs.
Lake Dearborn Corporation and Others,
Trial Court Defendants,
Respondent here.

Appeal from the Circuit Court of Cook County.

Burnt Record Proceedings.

Petition for Certiorari.

BRIEF OF GUARDIAN AD LITEM IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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Guardian Ad Litem
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Chicago 2, Illinois

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL., LAKEVIEW 5-6551

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In The

Supreme Court of the United States

October Term, A. D. 1956.

No. 1013

KATHERINE W. BRADLEY and Others, *Trial Court Petitioners, Respondent here,* and **BENNET BOTSFORD YOUNG,** *Trial Court Petitioner, Respondent here,* vs. **Lake Dearborn Corporation and Others,** *Trial Court Defendants, Respondent here.*	Appeal from the Circuit Court of Cook County. — Burnt Record Proceedings. — Petition for Certiorari.

BRIEF OF GUARDIAN AD LITEM IN OPPOSITION TO THE PETITION FOR CERTIORARI.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, filed October 31, 1955, appears at (Abst. 233).

The petition for rehearing and the order of November 16, 1955, denying it appear at (Abst. 233).

The Illinois Supreme Court on March 15, 1956 denied petition for leave to appeal, page 58 of Appendix A of Petition for Certiorari.

JURISDICTION

Petitioner seeks to invoke jurisdiction of this Court pursuant to Section 1257 (3) of the Federal Civil Code and Rule 19 of the Rules of the United States Supreme Court.

QUESTION PRESENTED

The question presented is whether there is involved in the instant case a substantial Federal question.

STATEMENT OF THE CASE

Petitioner requests a writ of certiorari to review the decision of the Appellate Court of Illinois, First District, affirming the decrees entered by the lower court.

The affirmance by the Appellate Court rested upon,

(A) failure and refusal of petitioner to file any pleading denying the facts alleged in the petitions in the Burnt Record cases.

(B) failure and refusal of petitioner to file in proceedings below any pleading presenting to the lower court a right, title, interest or claim, that court under the provisions of the Burnt Record Statute could then have taken jurisdiction of.

Two separate petitions to establish and confirm title to real estate had been filed in the Circuit Court of Cook County, Illinois under the Burnt Record Statute, Ill. Rev. Stats. 1953, Chap. 116.

Petitioner was named a party defendant therein and was duly served with summons. Under the provisions of the Burnt Record Statute it was the duty of petitioner, who

was named a defendant and served with process, to appear and establish by competent evidence whatever claims petitioner had to the real estate involved in the proceedings.

Petitioner failed to assume this duty and under the statute, the decrees entered were final and conclusive as to petitioner. Sec. 16 of the Act. Ill. Rev. Stat. 1953, Chap. 116, Sec. 20.

In the proceedings in the Circuit Court, petitioner filed a series of pleadings consisting, among others, of a plea in Bar, a plea of the Statute of Limitations and a plea of Laches. (Bradley Abst. 37-42-45). None of these pleas stated a defense to the actions and upon motion were stricken. At long last, petitioner filed a pleading identified as "Suggestions as to the dissolution of Lake Dearborn Corporation." (Bradley Abst. 53).

This last pleading, was, on motion, ordered (Bradley Abst. 54) to stand as petitioner's answer to the petitions.

Thereafter, hearings were had before a Master and the Chancellor.

Decrees were entered in each of the Burnt Record cases and each decree specifically provided (Bradley Abst. 133) that any lien or claim for liens which petitioner had against the real estate therein involved were not to be affected.

SUMMARY OF ARGUMENT.

The only question presented is whether there is involved in the instant case a substantial Federal question.

ARGUMENT.

I.

The only point raised in the petition is whether there is involved in the instant case a substantial Federal question.

It is conceded that actions under the Burnt Record Statute are special statutory proceedings and if the provisions of that statute were complied with, the decrees herein were properly entered.

Petitioner complains of the failure to name the stockholders or creditors of Lake Dearborn Corporation as parties to the proceedings, although none of them were proper and necessary parties and no one of them had any interest in the real estate described in the Petitions, which could under the Burnt Record Statute have been adjudicated in this action. The failure to name these parties did not evade any constitutional guarantee reserved to this petitioner. State practice and procedure forbid naming them parties in these proceedings. This Court has held "But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guarantees."

Drivers Union v. *Meadowmoor,* 312 U.S. 287 at 296.

Under Illinois State practice and procedure and under the provisions of the Burnt Record Statute, petitioner, and others similarly situated, who have been named and served with process as defendants, are granted the right to appear, to plead and to prove any claim other than lien claims, they have against the real estate described in the Burnt Record petitions.

This exclusion of claims for liens in proceedings had under the Burnt Record Statute does not leave petitioner and others similarly situated, without remedy.

Lien claims, claims for an accounting or for partition are, under Illinois Law, to be presented in the forum designated by law for their presentation.

This forum, in Cook County, Illinois, is the Circuit or Superior Court of the County, and no Bar is there raised against such claims if they not be urged or asserted in proceedings had under the Burnt Record Act.

Petitioner has pending, a suit in the Superior Court of Cook County, Illinois against respondents for partition, accounting and other relief. (Abst. 212-228)

Petitioner ought not be heard to complain that serious Federal and constitutional questions are now presented because the subject matter of the Superior Court suit should have been allowed to have been asserted and proven in the Burnt Record cases.

This limitation of the right to assert a claim for a lien in a Burnt Record proceeding does not deprive petitioner as claimed, of due process, equal protection of the laws, uniformity of laws and equal administration of the laws and it is not in conflict with any provision of either the Federal or State Constitutions. Petitioner's contentions are in these respects without merit.

In *Loeber* v. *Schroeder,* 149 U.S., p. 580 at page 585, this Court stated:

> "The provisions of the Statute complained of by Plaintiff in Error are manifestly not in conflict with any provision of the Constitution of the United States, or of any law of Congress passed in pursuance thereof.

> The said statute relates to a matter of state practice alone, and the proper construction of that statute, upon well settled principles rested with the State Courts."

In *Northern Pacific Railroad* v. *Patterson,* 154 U.S., p. 130 at page 134, this Court held:

> "But it was for the Supreme Court of Montana to determine whether the Statute was exclusive and whether plaintiff came within its terms or not, and its action in that regard raises no Federal question for our consideration."

The question before the Appellate Court was whether the trial court had ruled correctly in holding that in a proceeding under the Burnt Record Statute to confirm and establish title to certain real estate, a claim for a lien could not be asserted or proven.

In sustaining the decrees, the Appellate Court was merely following the command of Section 15 of the Burnt Record Act, Illinois Revised Statutes, 1953, Chap. 116, Section 19, which reads:

> "But said decree shall not in anywise affect any lien or liens to which said fee may be subject and which have been created since the destruction of such records, whether the same be by mortgage, deed of trust, judgment, statutes, mechanic's lien or otherwise, but shall leave all such liens to be ascertained or established in some other proceeding or to be enforced as the parties holding them may see fit."

Consideration by the Appellate Court of this section of the statute and its approval of the same does not present a question of Federal Law. State Law only was involved.

In *Williams* v. *Kaiser*, 323 U.S. p. 471, at page 481, this Court stated:

> "In cases coming here from the State Courts, this Court has no power to pass on questions of State law, it can review a State Court decision only in so far as that raises a question of Federal Law and it can then only pass on the Federal question if a decision on the Federal law was necessary for the judgment rendered by the State Court."

This respondent prays that the petition for a writ be denied.

Respectfully submitted,

SARSFIELD COLLINS,
Guardian Ad Litem.

JUN 27 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 148

EVELYN PRATT ELLITHORPE,
Petitioner,

vs.

BENNET BOTSFORD YOUNG,
Respondent,

and

KATHERINE W. BRADLEY, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

PRELIMINARY STATEMENT.

Respondent Young and the several respondents Bradley to the petition for writ of certiorari were the petitioners in two separate suits originally filed in the Circuit Court of Cook County to establish and confirm the title to separate tracts of real estate owned by respondents Young and Bradley, respectively. These suits were brought under an Illinois statute generally referred to as the Burnt

Record Act of Illinois (Illinois Revised Statutes 1955, Chap. 116 §§ 5-28). The cases are herein referred to as the *Young* case and the *Bradley* case. The only respondent named in the petitions who opposed the allowance of the relief prayed was the petitioner here, Mrs. Evelyn Pratt Ellithorpe, who was a party to both petitions. She was made a party because she had recorded a self-serving instrument which she called a "caveat" as a cloud upon the title to real estate owned by respondents (Bradley Abst. 22). Petitioner later claimed a lien against the property and made no other claim thereto. As will appear hereinafter, the disposition of lien claims is beyond the scope of the Burnt Record Act, but respondents did not interpret the "caveat" as being limited to a claim for lien. After hearings before a master in chancery of the Circuit Court, in accordance with Illinois procedure, separate decrees were entered granting the relief prayed.

Petitioner Ellithorpe took an appeal to the Supreme Court of Illinois and that Court made no decision on the merits but transferred the case to the Appellate Court of Illinois for the First District because under the Constitution and statutes of the State of Illinois it had no jurisdiction of the appeal.

The Appellate Court considered the case and filed an opinion which was designated "Not to be published in full." Petitioner then sought leave to appeal in the Supreme Court of Illinois, and this was denied. The present petition for certiorari followed.

As to Publication of Opinion.

The opinion of the Appellate Court delivered in connection with the judgment which is sought to be reviewed was published in abstract form only, in accordance with the statute (Illinois Revised Statutes 1955, Chap. 37, § 66).

The opinion is found in 7 Ill. App. 2d 440 and 129 N. E. 2d 578. The opinion in the former citation contains one headnote only, while that in the latter contains four.

As to Jurisdiction of This Court.

The petitioner states that the jurisdiction of this Court is invoked because the "Illinois courts have decided federal questions of substance not heretofore determined by this Court, and also have decided other federal questions in a way probably not in accord with applicable decisions of this Court."

It is the position of respondents that no federal questions whatever were involved in the disposition of these cases by any of the courts that decided and reviewed them.

Constitutional Provisions.

Petitioner appears to rely upon Amendment 14, Section 1, and Amendment 9 to the Constitution of the United States of America (see Appendix D of the petition).

Petitioner also cites various provisions of the Constitution of Illinois. It is not clear whether or not this Court is being requested to review these cases because of alleged violations of the Constitution of Illinois.

II.

STATEMENT OF THE CASE.

The statement in the petition (page 8) that the cases were consolidated in the trial court is erroneous, as will appear from the order referred to (Abst. 33). This order specifically states that the cases were consolidated "for appeal only." The interesting question as to whether or not a trial court had the authority to consolidate the cases for appeal only is immaterial to any issue in this case. In

fact the cases were not consolidated, and a separate decree was entered in each case. Furthermore separate abstracts of record were filed in the Supreme Court of Illinois, although by order of that Court the cases were consolidated for a hearing, and a single brief was filed by each side.

It does not appear from the notice served by counsel for petitioner whether or not both abstracts are filed in this Court with the petition and it may be that only the abstract in the *Bradley* case was filed. The cover of the abstract served upon respondents appears to include both cases, but in fact only the record in the *Bradley* case is abstracted. The general relief prayed was similar in each case, but the real estate and parties were not the same. The petitioner in this Court was a party defendant in both cases.

In referring to the abstract pages, respondents will refer to the pages in the abstract of the record in the *Bradley* case, which is the more complete abstract and which appears to have been filed with the petition for certiorari.

The Burnt Record Act of Illinois.

Shortly after the Chicago Fire a statute was enacted, which is still in force, Illinois Revised Statutes 1955, Chap. 116, §§ 5-28. This statute provides in substance (§ 15) that a person claiming title to real estate, the records concerning which have been destroyed, may file a petition to have his title established and confirmed. The petition must describe the property, state the title claimed by petitioner and include a showing as to the source of that title. In practice, this showing is made by including in the petition an abstract of title beginning with title in the United States. The petition must also allege the destruction of the records and should make all persons interested in or claiming an interest in the title party defendants.

The relief granted upon proof of the allegations in the petition is (1) that the chain of title stated in the petition, if proved, becomes a matter of record in place of the destroyed records, and (2) that the claims of persons other than the petitioner with respect to the real estate are disposed of.

Parties defendant are served personally or by publication, as the case may be, and are required to appear and assert their claims, if any. The statute was before this Court in the case of *Gormley* v. *Clark*, 134 U. S. 338 (1889).

The statute specifically provides (Illinois Revised Statutes 1955, Chap. 116, §19) that the disposition of liens or claims for liens is beyond the scope of the statute and such liens or claims are not affected by any decree that is entered.

As to Claims of Petitioner and the Disposition Thereof.

Petitioner was served with summons in each case and in each case appeared and filed a pleading designated "Answer and Cross-Petition for an Accounting and Lien." This pleading was stricken on motion of petitioners because of the provision in the statute that liens and claims for liens cannot be disposed of in a Burnt Record proceeding and because an accounting is not germane to the petition. It should be noted that the final decree in each case (Bradley Abst. 133) contains the following language:

> Neither this proceeding nor this decree should in anywise affect any lien or liens or claim or claims for lien or an accounting in a separate and distinct proceeding to which the fee of the real estate hereinabove described may be subject, etc.

In November 1947, petitioner filed a suit in the Superior Court of Cook County for partition and an accounting (Bradley Abst. 212) and the respondents and other de-

fendants not parties to the Burnt Record proceedings filed answers. The abstract shows only the answers of certain defendants who were not parties to these present suits (Bradley Abst. 206). This Superior Court suit involves the same real estate as the instant case and is still pending and undisposed of.

After this first pleading of petitioner was stricken in each of the two Burnt Record cases she filed a succession of pleadings which she designated as "Pleas" (Bradley Abst. 37, 42, 45), which were stricken for the reason that they stated no defense to the petition.

Respondents here then made a motion that defendant be required to answer the petitions or, in the alternative, that she file motions which presented no questions which had already been determined, and this motion was allowed by the court (Bradley Abst. 47).

In spite of this order of court, petitioner made another motion to vacate and reverse the orders of court which had overruled her several "Pleas" (Bradley Abst. 48). Respondents then made a motion to default petitioner for failure to comply with the order of court that she file an answer or proper motion. That motion was allowed in part by an order (Bradley Abst. 51) which denied the motion of petitioner to vacate former orders, denied respondents' motion for default and extended the period of a rule to answer that had been entered against appellant.

Nevertheless appellant did not answer; instead she filed (Bradley Abst. 53) a pleading entitled "Suggestions as to the Dissolution of Lake Dearborn Corporation." Petitioners then made a motion that appellant be defaulted for failure to comply with the rule to answer or, in the alternative, that her last pleading stand as her answer, and pursuant to this motion an order was entered (Bradley Abst. 54) that the pleading entitled "Suggestions as to

the Dissolution of Lake Dearborn Corporation" stand as the answer of petitioner.

Respondents replied to this latter pleading, considered as an answer, petitioner filed another motion to dismiss (Bradley Abst. 60), which was denied, and the cases were referred to a master in chancery.

No pleading designated as an answer or denying any fact stated in the petition was ever filed in either case, but in the *Bradley* case, while the cause was before the master, the petition was amended on motion of respondents to correct a misstatement concerning an outstanding dower interest (Bradley Abst. 62-75). Thereafter petitioner filed a pleading which she designated "Notice for Bill of Particulars," which was actually an argument (Bradley Abst. 78), and respondents filed a statement in response to this notice (Bradley Abst. 75).

Petitioner then filed in the *Bradley* case an answer to the amended complaint (Bradley Abst. 80), although the amendment in no way concerned her. This answer did not deny any of the averments of the complaint but restated the substance of the "Pleas" petitioner had theretofore filed and restated petitioner's contention that service of process on other defendants than herself was insufficient. Respondents replied to the answer of petitioner. Thereafter petitioner filed interrogatories (Bradley Abst. 94), which respondents deemed utterly immaterial but which respondents answered (Bradley Abst. 90).

Petitioner then filed in both cases a motion to quash the process and to dismiss the suits (Abst. 96), which was referred to the master along with other issues in the cases (Abst. 95).

The master heard evidence and filed a report recommending the relief prayed in the petitions. Objections and exceptions were filed, argued and overruled, and decrees

were entered. Thereafter appeals were taken as hereinabove stated.

III.

THERE IS NO FEDERAL QUESTION INVOLVED.

The petition for certiorari is substantially a reargument of contentions made before the Illinois courts. The only federal questions suggested are that petitioner has been deprived of her property without due process of law and that she has been denied equal protection of the laws.

Petitioner was accorded all of her procedural rights. She was personally served with summons, she appeared and filed many pleadings and she took part in hearings and offered evidence.

The only claim petitioner ever made with respect to the real estate described in the pleadings is that she had a lien against it. Respondents deny that she had any lien, but if she had one it is not affected by the decrees, which expressly preserved to her the right to establish a lien in some other proceeding if she can (Bradley Abst. 133). Thus the decrees do not deprive petitioner of any substantive rights she has ever claimed.

IV.

REFUTATION OF PETITIONER'S STATEMENT AND ARGUMENT.

Pages 8-29 of the petition purport to be a statement of the case but are in fact a series of arguments, some of which have no basis in the record and some of which are contradicted by the record. Pages 30-51 of the petition purport to be an argument. Neither the statement nor the argument meet the issue as to whether or not there is any question involved that could cause this Court to grant certiorari.

The organization of petitioner's statement and argument is such that it is not feasible, or even possible, to answer her contentions in the order in which they are presented. Respondents will state and discuss what appear to be the principal contentions of petitioner.

1. As to the service of process.

Petitioner admits that she was personally served but contends that service upon other defendants was defective. Certain defendants were served by publication. Respondents are confident that the service by publication was valid, but even if it were not it is no concern of petitioner, who was personally served with summons. The Burnt Record Act provides (Illinois Revised Statutes 1955, Chap. 116, § 20) that a decree in such a case shall be void as to any person not made a party but "shall be final and conclusive as to all others." The statute states the general rule in chancery practice. The affidavits for publication were proper and sufficient, but even if defective do not affect the validity of the service upon petitioner. There is no federal question presented in connection with the service in this case.

2. As to the dissolution of the Lake Dearborn Corporation.

This corporation was a party defendant. It was a Delaware corporation, and prior to the filing of the suits had lost its right to do business in Illinois but was still in existence in Delaware (Bradley Abst. 189). These suits were filed in January 1947 and the charter became inoperative in April 1947. The corporation was served by publication, and thereafter it was dissolved by operation of law in Delaware, but under Delaware law its existence continued so far as pending suits were concerned. This corporation and its shareholders were properly made parties

and served, but even if there were some defect in the procedure this would not affect petitioner or prevent her from being bound by the decree. And certainly no federal question affecting petitioner is presented.

3. As to defendants, their names and the presence of necessary parties.

Petitioner was made a party because she had filed (Bradley Abst. 22) an instrument apparently claiming an interest in respondents' title. The only necessary party as to the issue of the validity of her claim was petitioner. Respondents are confident that the defendants were properly named and all necessary parties were present, but this does not concern petitioner. There is nothing in the record except counsel's statement (Bradley Abst. 153) to support the assertion that eight hundred people should be named as parties. Any defect as to other parties could not deprive petitioner of any rights under the Constitution of the United States.

4. As to consolidation in the trial court.

Petitioner contends that the cases were consolidated in the trial court. The record (Bradley Abst. 34) shows otherwise. It is not clear just why petitioner contends that this matter of consolidation affects her constitutional rights. Petitioner states that consolidation was ordered by Judge Prystalski, the trial judge, but that after his death the order was ignored. This statement is not borne out by the record. Orders entered by Judge Prystalski in his lifetime after the purported consolidation appear in the Bradley abstract at pages 41, 42, 44, 46, 51 and 52 and similar orders, all entered by Judge Prystalski, are referred to in the Young abstract at pages 3 and 4. We do not know whether or not petitioner has filed the Young abstract in

this Court. No federal question can possibly be presented by this contention.

5. As to the decree in reorganization proceedings in 1936.

One of the defendants, the Lake Dearborn Corporation, was successor to a reorganized corporation, the Dearborn-Lake Corporation, which latter corporation went through a 77B proceeding in 1936. The decree in this matter does not appear in evidence except by way of recital in the complaint which petitioner filed in the Superior Court of Cook County, Illinois and which is now pending (Bradley Abst. 216). It is clear, however, that the reorganization was "closed and terminated" (Bradley Abst. 217). The decree also enjoined all persons from suing upon leasehold bonds, past due (in 1936) ground rents or other claims included in the reorganization proceedings (Bradley Abst. 216). Respondents are not suing on account of any of those matters. So far as petitioner is concerned she is a party because she claims an interest in respondents' property, as disclosed by the "caveat" (Bradley Abst. 22) which she recorded as a claim against respondents' property.

The case of *Stoll* v. *Gottlieb*, 305 U. S. 165, has nothing whatever to do with the present case. In that case there was a reorganization proceeding under Section 77B of the Bankruptcy Act. Thereafter there was a suit in the Municipal Court of Chicago, which was reversed by the Appellate Court of Illinois, which was reversed by the Supreme Court of Illinois, which in turn was reversed by the Supreme Court of the United States. The basis of the decision was that the bankruptcy court had jurisdiction of the parties and subject matter of the subsequent suit. In the present case, the court in 1936, ten years before the suits were filed, entered an order that the reorganization

proceedings were "closed and terminated" (Bradley Abst. 217). Petitioner's claim to respondents' property is in no way connected with the reorganization proceeding.

6. As to limitations and laches.

The Illinois statute on limitations has a section (Illinois Revised Statutes 1955, Chap. 83, § 10a) designed to improve the marketability of titles, sometimes known as the Seventy-five Year Limitation Act of 1941. Its principal purpose is to make it possible for title examiners to ignore old unreleased mortgages and interloping conveyances that are of record and appear in abstracts of title. Petitioner contends that since the Chicago Fire occurred more than seventy-five years ago the statute is a bar to the Burnt Record suits. A reading of the statute will show that this is erroneous, and in any case the construction of the Illinois statute of limitations by an Illinois court violates no right of petitioner under the Constitution of the United States.

Respondents do not understand the contention of petitioner that the doctrine of laches has something to do with any of petitioner's rights. Petitioner filed her "caveat" dated November 1945 (Bradley Abst. 22) as a cloud on respondents' title. Slightly more than a year later respondents filed these suits. Laches is an equitable doctrine and petitioner shows no basis for its application. Respondents are unable to see how the cases cited—*O'Brien* v. *Wheelock*, 184 U. S. 450, and *Whitney* v. *Fox*, 166 U. S. 637—have any relevance to the present situation. These cases are apparently cited for the proposition that sometimes a plaintiff may be barred by laches from prosecuting a suit even though the statute of limitations has not run at law. These cases have no relevance in the present case.

7. As to the charges against Messrs. Farr and Chinnock.

Mr. Newton C. Farr and Mr. Ronald J. Chinnock operate a real estate firm in Chicago and one of their functions is building management. They have for some years managed for respondents the real estate described in the petition but have no interest whatever in the property. They are not parties to either of the Burnt Record suits, but petitioner made them parties to her suit now pending in the Superior Court of Cook County referred to hereinabove.

There is absolutely no justification in the evidence for the reckless charges petitioner makes against them. And in any case, how is their integrity material to petitioner's constitutional rights under the present record? If she is entitled to an accounting from them, the decrees appealed from expressly preserve her rights (Bradley Abst. 133).

8. As to default after amendment.

No amendment was ever filed in the *Young* case. During the hearings before the master an amendment was filed in the *Bradley* case to correct a slight error as to an outstanding dower interest. Certain defendants had been theretofore defaulted. A rule to answer was entered and they were again defaulted as to the complaint as amended.

It is submitted that this was proper chancery practice, particularly since no defaulted defendant could have been damaged by the amendment. Although petitioner was in no way concerned by the amendment, she answered the complaint as amended (Bradley Abst. 80). Even if other defendants were wrongfully defaulted—which respondents deny—no right of petitioner was affected, and no federal question is presented.

9. As to proceedings in Illinois courts of review.

Petitioner appealed to the Supreme Court of Illinois. That Court, finding that it had no jurisdiction of the appeal, transferred the case to the Appellate Court for the First District of Illinois. The Supreme Court wrote no opinion and the clerk refused petitioner permission to file a petition for rehearing. The Appellate Court considered and decided the appeal, and wrote an opinion, which was published only in abstract form. Petitioner then prayed leave to appeal to the Supreme Court of Illinois and this was denied.

Petitioner contends that her rights under the Constitution of the United States were violated because the Supreme Court of Illinois wrote no opinion when it transferred the case and because the clerk of that Court refused to accept a petition for rehearing. The case was transferred under the provisions of the statute (Illinois Revised Statutes 1955, Chap. 110, § 86). Due process does not require a written opinion or a rehearing in any case and certainly not in the situation presented by the present record where there was no decision on the merits.

10. As to judicial notice.

Respondents made a motion that judicial notice be taken of the Chicago Fire in 1871 and the fact that the records in the Cook County Courthouse were destroyed (Bradley Abst. 145). Counsel for petitioner objected mildly on the grounds that the suit was barred by the Seventy-five Year Statute of Limitations but agreed that the fire was an historical event (Bradley Abst. 146). The objections to the master's report (Abst. 104, No. 18) state only the objection that the limitations statute makes judicial notice improper.

It is submitted that the rule of a state as to judicial notice does not present a federal constitutional question.

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11. As to the contention that a forfeiture is involved in these cases.

Respondents do not see how the reluctance of a court of equity to enforce a forfeiture has anything to do with this case. Petitioner claimed a lien and, while respondents contend that the claim is without validity, the decrees appealed from preserve whatever lien claim she may have.

Petitioner refers to a 99-year lease. She refused to file any pleading making any claim under any such lease, although invited to do so many times (see, for example, Bradley Abst. 177, 178, 179). It is clear that petitioner recorded an instrument as a cloud on respondents' title; that she was personally served and given an opportunity to support the claims set out in the recorded instrument. When her claim for lien was stricken she made no other claim but filed the suit now pending in the Superior Court of Cook County. No federal question can arise from this situation.

12. As to public importance of this litigation.

As to this section of the petition, respondents will say nothing more than that the statements made are not supported by the record.

Contentions 1-12 discussed hereinabove appear to be the principal bases for petitioner's position. There are other statements made, some of which are improper. For example, on page 24 the statement is made that no Burnt Record proceeding appears on the docket of the Circuit Court of Cook County for twenty years prior to January 21, 1947, the date the present suits were filed. There is nothing in the record that shows this statement to be the truth and respondents deny it. In 1932, the Supreme Court of Illinois, in the case of *Pullman Car and Mfg. Co.*

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v. *Stroh*, 349 Ill. 492, the court construed the Burnt Record Act in the following language:

> * * * The destruction of records in a chain of title gives a court of chancery jurisdiction, on petition, to inquire into and establish title, and having so acquired jurisdiction it may remove a cloud from the title in the same suit. *Gage* v. *Harbert*, 145 Ill. 530; *South Chicago Brewing Co.* v. *Taylor*, 205 id. 132.

This was less than fifteen years prior to the filing of the present suits.

As to Petitioner's Appendix A.

Respondents will not lengthen this argument by commenting upon each entry in the time-table shown at Appendix A. Many of the statements there made do not appear of record except as allegations in petitioner's suit which is still pending.

CONCLUSION.

Respondents have not discussed most of the authorities cited by petitioner. Not one of them has any bearing upon the issue as to whether any federal question is involved. Likewise, respondents have not referred to what they consider the unsupported and irresponsible charges of "Sham, Fraud, and Evasion." Respondents invite the attention of the Court to the record and submit that it shows no basis for such charges.

The only issue before this Court is whether or not petitioner's rights under the Constitution of the United States were violated. She was duly served with process, she appeared and took an active part by her counsel in lengthy proceedings, and the final decrees specifically do not dispose of the only claim she ever asserted—that is, that she had a lien against the property.

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It is the position of respondents that the petition for certiorari should be denied.

Respectfully submitted,

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JUL 1 3 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 148

EVELYN PRATT ELLITHORPE,
Petitioner,

vs.

KATHERINE W. BRADLEY, and
BENNET BOTSFORD YOUNG and others,
Respondents.

REPLY BY ELLITHORPE PETITIONER TO ANSWER BRIEFS FOR RESPONDENTS.

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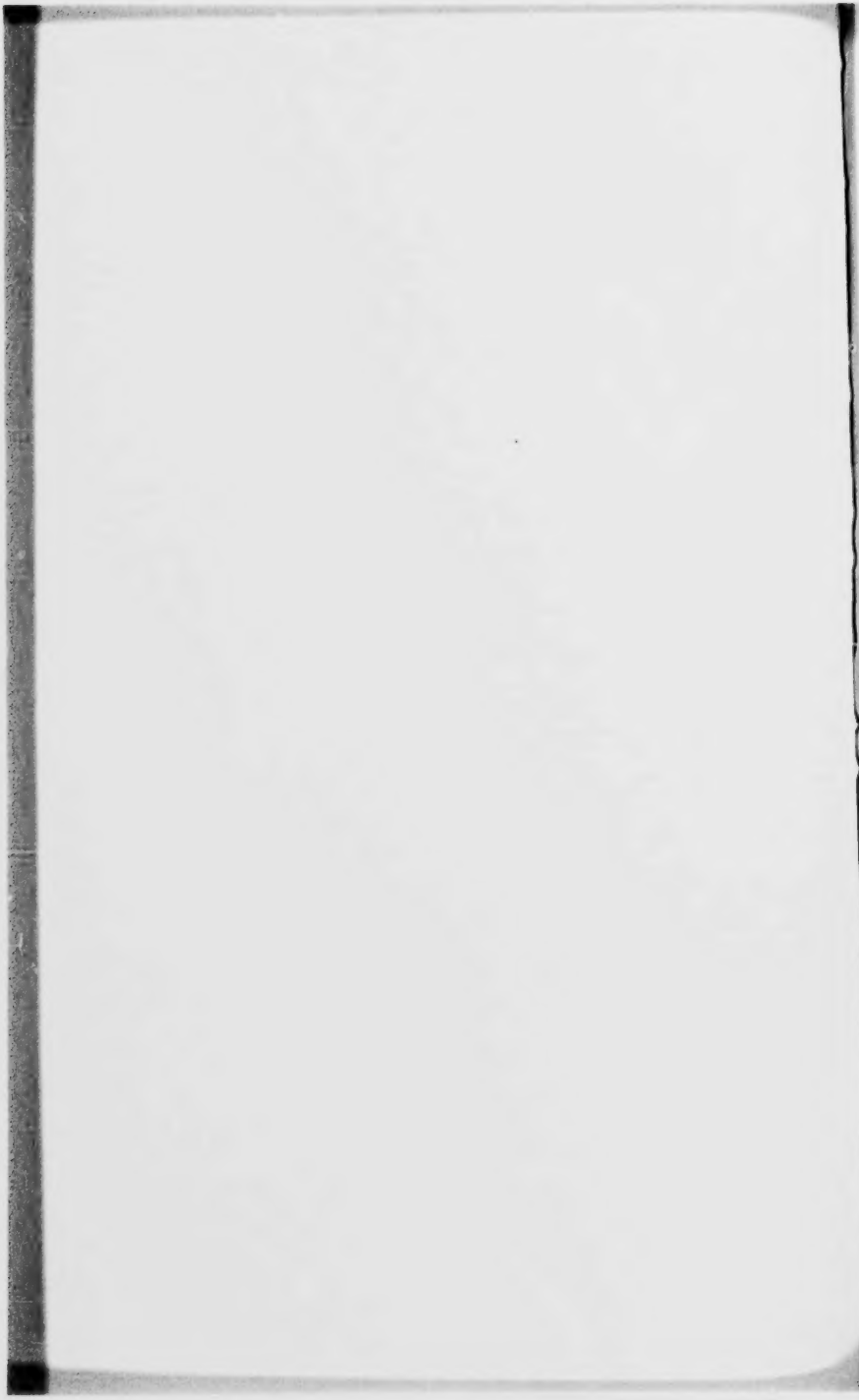

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 148

EVELYN PRATT ELLITHORPE,

Petitioner,

vs.

KATHERINE W. BRADLEY, and
BENNET BOTSFORD YOUNG and others,

Respondents.

REPLY BY ELLITHORPE PETITIONER TO ANSWER BRIEFS FOR RESPONDENTS.

Except as herein expressly admitted Petitioner Ellithorpe denies and protests the whole of Answer Briefs for Respondents, and denies all statements therein made.

Cases Mentioned by Respondents.

Respondents refer at page 5 to *Gormley* v. *Clark*, 134 U.S. 338. That case arose in old Circuit Court of the

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United States for the Northern District of Illinois at Chicago. It was decided on appeal in year 1889, less than twenty years after Chicago fire.

Judicial Notice is not mentioned by any one anywhere in the *Gormley* case. On the contrary witness Bradley failed to prove any destruction of records by fire (Gormley abstract 121-122). And witness Martin was called for testimony about the fire (Gormley abst. 127). Testimony and documents were used to prove that case.

That *Gormley* case was framed extensively for removal of clouds on title. (Leaseholds are not clouds on titles). Years after the Chicago fire, Gormley recorded documents against the title to a subdivision. And in 1877 he and wife mortgaged the property. The bill and evidence rely basically upon completed foreclosure proceedings in the state courts, that were affirmed on appeal. An injunction was asked and entered at the outset, and later a writ of assistance to oust Gormley and others, and place Clark in possession, 134 U.S. 341. In Gormley abstract, the reference to Burnt Record was short and incidental. The bill and record appear to be complete without Burnt Record action. 134 U.S. 349. There was extensive oral testimony and documents (Gormley abstract 99-121 and 240 *ff*, and decree 38-42). The acts of Gormley to cloud the title are fully stated in detail by complaint (Gormley abstract 4-8). All defendants are named in headings to bill, to summons, to publication, to notices, and especially in parties paragraph, and all notices served. There was special prayer for injunction and other relief (Gormley abstract 7-9 and 16-19). There was special court order for personal service upon non-residents, and proof of such service made and filed. That service was made by United States Marshal in State of Vermont (Gormley abstract 32-35). There

was direct testimony about residence of the defendants. The newspaper notice publication to parties not resident and not summoned, was four successive weeks, and copies were mailed by clerk of court to non-residents. Proofs of that service were filed in the cause (Gormley abstract 32-35).

All these bases, which are necessary for constitutional jurisdiction, that were used in the *Gormley* case, *are absent from the record at bar.* That absence is shown by Ellithorpe Petition, and abstract in this Court (Abst. 37-107). Although the *Gormley* case which is cited by Respondents as classic example, has been available to Respondents for many years to show them what to do, in proper conduct of this kind of litigation, the incomplete and barren record herein made by Respondents, is an example of what not to do (Petition 10-20).

Ignoring the Gormley authority and example, Respondents failed by their pleading, by their notices and their decrees, to establish constitutional service of process, and failed to make any reference about any interest of Mrs. Ellithorpe, to connect her in any way whatever with the subject matter of the proceeding. No reference was made to her *caveat,* by Respondents in their record at any time (Abst. 80). Respondents ignored the decree for reorganization in United States District Court, No. 56924, dated 1936. Upon that decree as a muniment of title, Mrs. Ellithorpe had relied when making her investment (Abst. 218-12). Illinois Courts refused to enforce that federal court decree.

At page 11 Respondents say that *Stoll* v. *Gottlieb,* 305 U.S. 165 is not relevant, to show enforcement of reorganization decree. If such decree herein (Abst. 23, 38, 41, 215, 216) modifying leases of land, be not a muniment of

title, what kind of decree ever could be? Bankruptcy action is primary law of the land, so made by the Constitution of the United States. *Kalb* v. *Feuerstein,* 308 U.S. 433 443). The *caveat* (Abst. 22*ff*) expressly stands upon that decree made in case 56924, a reorganization proceeding in United States District Court at Chicago. That *caveat* is exhibit A to said cross-petition by Ellithorpe (Abst. 15*ff*). Dismissal of answer and cross-petition (Abst. 34) on motion by Respondents, carried *caveat* into new suit (Abst. 206ff) in Superior Court. Ellithorpe reasserts the pointed relevance and authoritative character of the *Stoll* v. *Gottlieb* decision, 305 U.S. 165, as precedent to dismiss Burnt Record suits. (Pages 4 and 16 of Petition)

At page 12 Respondents say *O'Brien* v. *Wheelock,* 184 U.S. 450 and *Whitney* v. *Fox,* 166 U.S. 667, are not relevant to status of this record. Respondents fail to meet or discuss the factual matter and relevancy presented by pleas by Ellithorpe (Abst. 42-46). Ellithorpe reasserts those cases are in point directly for Burnt Record dismissal and to sustain her pleas on the record.

The Brief for Guardian *ad Litem* at page 5 mentions *Loeber* v. *Schroeder,* 149 U.S. 580 at 585. Your Honors there stated that you had no jurisdiction because quashing a writ in the trial court was not a final order. That has no relevancy to our case. The answer Brief for Respondents herein at page 11 confirms finality of the decree.

The Brief for Guardian *ad Litem* at page 6 mentions *Northern Pacific Railroad* v. *Patterson,* 154 U.S. 130 at page 134. In that case the litigant having notice from county board for tax equalization, had failed to pursue administrative remedy, before coming to court. Respondents do not mention any relevancy to this present record. On the contrary they contend we have been too diligent about our efforts to defend against Burnt Record litigation, after

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summons from Respondents. Ellithorpe clearly has used all possible procedures. The citation has no relation to this present record.

The Brief for Guardian *ad Litem* at page 7 mentions *Williams* v. *Kaiser*, 323 U.S. 471; and quotes from the *dissenting opinion* at page 481. The majority opinion rules to the contrary, and support position of Ellithorpe on this record.

Neither Respondents nor Guardian *ad Litem* face up to the issues presented by Ellithorpe Petition. They make bald negative statements unsupported by any detail of fact or argument. They abstain from analysis. They avoid frank discussion of most important issues.

Reckless Statements by Respondents.

At page 15 Respondents say further:

> "There are other statements made, some of which are improper. For example, on page 24 (Ellithorpe Petition) the statement is made that no burnt record proceeding appears on the docket of the *circuit court of Cook County* for twenty years prior to January 21, 1947, the date the present suits were filed. There is nothing in the record that shows this statement to be the truth and *Respondents deny it.* In 1932, the *Supreme Court of Illinois* in the case of *Pullman Car and Mfg. Co.* v. *Stroh*, 349 Ill. 492, construed the Burnt Record Act * * * That was fifteen years prior to filing of the present suit."

Eminent Counsel for Respondents thereby overlooked the first sentence of their citation. That sentence in *Stroh* case reads as follows (349 Ill. 493):

> "This (*Stroh*) case in the *circuit court of Cook County* was a *Petition filed June* 22, 1926, *under the Burnt Record Act,*" etc.

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Thereby the *Stroh* case was filed more than twenty years before the present litigation was begun January 21, 1947. Thereby said contention by Respondents is refuted by their own citation.

Petitioner renews her assertion that obsolete and unlawful procedures were used by Respondents. Instead of freedom for pursuit of happiness, your Petitioner has been the target of harassing litigation for ten years.

Respondents at page 10 ignore the positive language of order for consolidation, as follows (Abst. top 34):

> "It is ordered that Burnt Record cases 1766 and 1767 in this (circuit court) court, and also the counterclaim and cross-petition by Evelyn Pratt Ellithorpe for an accounting and lien in chancery, now on file in each of these Burnt Record cases, be and hereby *are consolidated* for purpose of appeal only, *and shall proceed as a single suit to be designated hereafter by all pleadings, notices and orders as Burnt Record* 1767."

That Record No. 1767 has been brought forward through Illinois courts to this Court, by the larger printed abstract —called Bradley by Respondents. Pursuant to that order of consolidation and later orders by Supreme Court of Illinois (Petition page 10), all references properly are made to that abstract, as abstract for consolidated case. The consolidation made both cases one, (below page 21).

Respondents say further at page 10:

> "The only necessary party as to the issue of the validity of her claim was Petitioner".

That statement ignores the controlling and applicable decisions by Illinois Courts discussed at page 31 of Petition. Respondents also ignore *Miller* v. *Hatfield,* 309 U.S. 1 and other decisions by Your Honors. All these cases decide that all proper parties must be before the Court,

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before hearing may be had and decree entered. In the trial Court and Illinois Courts of review, and here by her Petition, Ellithorpe at all times has objected that all hearings were premature and without foundation for want of parties necessary on the record. The *caveat* and pleadings in Superior Court, show clearly who were necessary parties, in Burnt Record proceeding, before the Order June 17, 1947 dismissed without prejudice the answer, *caveat* and cross-claim by Ellithorpe. (Abst. 34)

At page 10 Respondents say:

> "There is nothing in the record except counsel's statement (Abst. 153) to support the assertion that eight hundred people should be named as parties".

That colloquy at Abst. 152ff reads as follows:

> "Mr. Woods: I am contending that these people were not served by publication or in any other manner; and I have a right to show that they were not served by publication, and that is what I am trying to do.
>
> "Mr. Bodman: I say they were served by publication; but assume that they were not, how does that affect your client?
>
> "Mr. Woods: It affects my client in the way that it throws the whole burden of the defense on one person, when there are 800 involved. There is nothing more vicious than that.
>
> "Mr. Bodman: Well, none of the 800 people are here. (No denial made on record)
>
> "Mr. Woods: How could they be here when you never told them there was a lawsuit here?
>
> "Mr. Bodman: I suppose that the orderly procedure is for me to object or not to object, and I shall ask the reporter to read the last question. (Last question and answer read)
>
> "The Master: You may proceed. Any further examination of the witness?"

Thereby it appears that Mr. Bodman acquiesced at that time. He did so because the statement by Mr. Woods was based upon the record:—

> "Since April First 1947, all title and interest in all property which said former Corporation ever had, then passed by devolution of law, to become on that date, undivided and exclusive property of its former stockholders, who are about 800 in number, residing widely over the United States of America. They have not been made parties defendant, nor summoned by process." (Abst. 46)

It is obvious that a corporation which had built a commercial structure at a cost exceeding one million dollars in 1928, when reorganized in 1936 (Abst. 23, 38, 41, 215-216 and elsewhere) by the United States District Court at Chicago, would have a large number of stockholders, former bondholders, scattered widely over the United States, many years later when Burnt Record was filed. It was ruthless indifference and sabotage for Respondents to ignore these owners of the leasehold property, in their conduct of this litigation. An honest suit would have stated expressly that the leasehold was not to be affected by the Burnt Record Proceeding. (Pages 10, 12, 15 below.)

Respondents say at page 8 that Petitioner made no other claim. They ignore all the jurisdictional pleadings and all the motions on constitutional grounds, set forth at pages 10-20 of the Petition, (Abst. 37-107). Since Respondents did not answer any of those pleadings, all fact statements made by each of the pleadings stand admitted by record.

Respondents suggest that Mrs. Ellithorpe in Burnt Record suit could have made claim for Lake Dearborn Corporation, since no one else appeared to do so. That is not true. As a stockholder she had no such authority.

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There being no attempt to serve summons, there was absent the indispensable basis for publication notice or service, and legal publication not having been made and copy mailed as compelled by Illinois Civil Practice Act and other statutes, to conform to constitutional requirements (Petition page 33) neither Mrs. Ellithorpe nor any one else, would have authority to appear for Lake Dearborn Corporation. Furthermore the Lake Dearborn Corporation was defunct (Abst. 53), and the stockholders (about 800—Abst. 46) had succeeded to leasehold title that was owned by Lake Dearborn Corporation at a former date. (Petition 17)

At page 13 Respondents say that Farr and Chinnock "Have no interest whatever in the property." At the trial (Abst. 165-166, 185-186) Respondents admitted Farr and Chinnock's ownership of stock in Lake Dearborn Corporation, individual stock and escrow stock. As such stockholders they became owners of undivided interest in escrow to the leasehold by devolution of title upon dissolution of Lake Dearborn Corporation (Petition 17; Abst. 101). They should have been made parties (Abst. 101), and should have performed the escrow trust; (Petition pages 53-54) but instead said Farr and Chinnock were directing attorneys to destroy the interest and property of their escrow beneficiaries. They also testified as though they were independent witnesses (Petition 26).

Hiatus between state and federal courts.

Respondents at page 11 say this:

> "One of the defendants, the Lake Dearborn Corporation, was successor to a reorganized corporation, the Dearborn Lake Corporation, which latter corporation went through a 77B proceeding in 1936. The decree in this matter does not appear in evidence except by way of recital in the complaint which Petitioner

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filed in the Superior Court of Cook County, Illinois, and which is now pending (Abst. 216)."

By such statement Respondents ignore the factual matters stated by plea in Bar (Abst. 37-38), which stand admitted on this record by the motion to strike made by respondents (Abst. 40). That Plea in Bar (Abst. 38), states admitted facts as follows:

"3. From that decree on December 16, 1936, in cause No. 56924, no appeal nor review was ever taken. That final decree remains in full force and effect. All the parties to this present suit and their grantors and privies were parties to that reorganization suit and all are bound thereby.

"4. By those proceedings and decree in said Cause No. 56924, the fee simple titles to the land and real estate which is described by the petition of plaintiffs (present Respondents) in this action, was established in the parties to that proceeding who are petitioners (present Respondents) in present suit or their privies, subject only to the lease-holds in favor of Lake Dearborn Corporation, which have been set forth by the answer and counterclaim in this present record, which was filed by Evelyn Pratt Ellithorpe.

"5. Thereby your defendant (present Petitioner for Certiorari) claims that all questions as to supposed Burnt Record titles, which are mentioned by plaintiffs (present Respondents) in this suit, were fully and finally adjudicated and removed from litigation against all parties to that suit (reorganization) and their successors and privies in title, and likewise against all parties to this (Burnt Record) suit.

"Therefore your defendant (Ellithorpe) pleads said proceeding in Cause No. 56924 and said final decree therein dated December 16, 1936, as complete and final bar to this present suit. Your defendant (Ellithorpe) asks that this (Burnt Record) suit shall be dismissed as oppressive litigation, with all costs against the pe-

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titioner plaintiffs (Respondents), and that your defendant (Ellithorpe) may recover her costs herein most wrongfully sustained".

If federal court decrees about real estate titles may be thus ignored, they are worthless. When Courts of Illinois refuse to enforce them, Your Honors should instruct by decision herein, what are the duties of District Courts. When present Counsel has asked Federal District Courts to enforce reorganization decrees, the answer has been "that such decrees when final, are details of title, to be enforced in State Courts, the same as all other civilian property rights".

REPLY FOR PETITIONER, ELLITHORPE.

This reply will ignore the division of material sought by the brief for Respondents, which rearranges and fragments the points discussed. We discuss under our original headings all their brief has said. All leasehold matters remain pending in Superior Court of Cook County.

I.

Respondents mention the statute (Abst. 58) of Delaware as to suits against Delaware corporations in the State of Delaware. That is a local procedural statute. Respondents did not file any suit in Delaware. That statute cannot be used in the State of Illinois. Illinois statutes govern time for suits in Illinois against persons and corporations. Respondents made no attempt to comply with applicable statutes of Illinois. Only Illinois law applies to real estate in Illinois. The publication notice under section 12 of burnt record act, has no sufficiency by itself. Petitioners have ignored sections of Illinois conveyances Act,

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corporation act, civil practice act, and chancery act, and many sections of burnt record act. Their record has no foundation. This we have shown by the Petition.

Lake Dearborn Corporation was defunct before present litigation was begun. Stockholders are owners of leaseholds.

Sections 157-122 and 123 of Illinois Business Corporation Act, provide for revocation of authority to foreign corporation to do business in Illinois, and for certificate of such revocation, and for recording of same in the county recorders office where business was done. See abstract page 189. Section 157-143 provides that annual franchise tax must be paid before July 31st in each year to prevent default and forfeiture; and section 157-149 provides that any such certificate by Secretary of State is evidence as to status of the foreign corporation. The case of *Dillon* v. *Gloss,* 256 U.S. 368 rules at page 376 that the date of the fact consummated controls, and the date of certification by the Secretary of State relates back to date of consummation of act certified.

Thereby the title to leasehold devolved in fact from Lake Dearborn Corporation, a Delaware Corporation, to vest in the shareholders on August first 1945, tho not certified by Secretary of State until November 15, 1945. The burnt record suits were not filed until January 21, 1947. All stockholders are necessary parties, if the leasehold is part of Burnt Record litigations. See page 15 below.

Recently Illinois Courts discussed the mandatory nature of correct publication pursuant to statute and the constitution, as basis for due process of law and equal protection of law: *People of Illinois Appellee* v. *Lloyd Jennings d/b/a Jennings Tavern,* 3 Ill. 2nd 125; 119 N.E. 2 781. The

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principle of that decision sustains the constitutional objections made at bar by Mrs. Ellithorpe for want of service upon Lake Dearborn Corporation, upon the so-called minors, and the stockholder successors to defunct Lake Dearborn Corporation.

The cases cited and discussed by Petitioner stand admitted. Their authority is not seriously questioned by anything said in the brief for Respondents. Those cases are the basic law of Illinois. Failure by Respondents to comply with that basic law, as stated by our factual demonstration from the record, and refusal by Master and trial court to compel such compliance, clearly establish the argument at page 30ff of Petition namely:

THE DECREES JANUARY 8, 1954 ARE VOID FOR DENIAL OF DUE PROCESS AND DENIAL OF EQUAL PROTECTION OF LAW, FOR FAILURE TO BRING NECESSARY PARTIES BEFORE THE COURT BY ESTABLISHED PROCEDURES, AND FOR DEPARTURES FROM BASIC REQUIREMENTS OF FEDERAL AND STATE CONSTITUTIONS.

II.

Tax Deed diversion by Respondents is not relevant for pleading on this record.

"No tax deed or certificate of tax sale based upon any proceedings, the record of which shall appear to have been destroyed, as aforesaid, shall be received in any of the courts of this state as prima facie evidence of the regularity of such proceedings, *but the burden of proof shall be upon the person claiming under such deed or certificate* to show the regularity and legality of such proceedings, in order to sustain the validity of any tax deed or sale for any tax or taxes, assessment or assessments, in any county to which the provisions of this act are applicable, in any suit or proceeding whatsoever, it shall be necessary for the party relying upon any such deed or sale to show,

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affirmatively, that each and all the provisions of law, in respect to assessment, levy, sale and deed of the lands affected, or to be affected by any such deed or sale as aforesaid, have been in all respects complied with — and no presumptions shall be indulged in favor of any such tax deed or sale; and it shall not be sufficient to show a collectors report, notice, judgment, order of sale, sale notice, notice of sale, tax affidavit and deed, anything in this law or any other law of this state to the contrary notwithstanding."

(Section 18 Burnt Record Record Act since 1874)

There are no tax deeds nor tax deed matters mentioned anywhere in the record at bar. So the provisions of that special statute can not be applicable to any defendant on this record. On the contrary, that statute shows that tax deeds are an exception.

So far as this record shows, the rights of Burnt Record defendants arise under common law and the general civil statutes. As to such persons the general civil practice applies. Under that practice Burnt Record Petitioners must state the matters to be resolved. Defendants need not answer conclusions of law, and do not admit them. It is elementary that only facts well pleaded can be determined. General conclusions of law lay no foundation for any decree.

The case of *Pullman Car & Mfg. Corporation* v. *Stroh* 349 Ill. 492 (cited at page 16 of brief for Respondents) rules as follows:

"The effect of the Burnt Record Act was to enlarge the jurisdiction of courts of equity, and *proceedings to establish title under that act, are chancery proceedings and the rules and regulations governing court of chancery in this state are applicable to them.*" 182 NE at 404. (Also Section 22 Burnt Record Act; and Petition page 42) Civil Practice Act controls.

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Issues as to leaseholds were not made part of the Burnt Record proceedings.

The leaseholds are not mentioned by the petitions nor by decrees. The buildings and improvements are not mentioned by petitions nor decrees. Furthermore the Master ruled that leaseholds were not an issue in these cases (Bradley Abst. pages 26, 178, 179) and the Court confirmed the Master (Abst. 111.).

Furthermore the admission by Respondents that suit was removed to Superior Court, admits that leasehold matters are there for that accounting (answer pages 5-6).

There never were any common counts nor general issues allowed to be used in chancery pleading. Always all pleadings for relief in equity, have been written statements of facts thruout the history of chancery. Always only facts and not conclusions of law, have been necessary to raise issues, and to sustain any decree. Sections 33 and 34 of Civil Practice Act and related provisions, and rules 11 and 15 by Supreme Court, continue that system of factual written pleading in chancery.

The primary duty to plead and prove facts, as their only means to raise issues for consideration by the court, remains as burden at all times, upon Respondents in pursuing their burnt record proceedings.

However instead of pleading about leasehold matters, or taking issue with pleading by Mrs. Ellithorpe about leaseholds in the burnt record proceedings, Respondents made motion to strike and dismiss entirely all pleading by Mrs. Ellithorpe, including her *caveat* exhibit A, claiming that none of the issues tendered in any manner by pleadings by Mrs. Ellithorpe, could be heard or determined in the burnt record proceedings, because they said,

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the court had no jurisdiction to hear or determine any of them. Whereupon the court assented to Respondents and gave them their wish, by striking and dismissing from circuit court, any and all matters presented and suggested by pleadings by Mrs. Ellithorpe, except only the "suggestions as to dissolution of Lake Dearborn Corporation".

Hill et al. v. *Hinman Avenue Building Corporation et al.*, 365 Ill. 129 6 NE 2 128, was relied on by Respondents.

In that case the trial court entered a decree to remove a 99-year lease as a cloud on title of lessors. The Appellate Court and the Supreme Court reversed, and directed dismissal of the complaint. Short quotation from the opinion by the Supreme Court will be sufficient.

> "The complaint alleges, and all parties admit, that the owners of the fee are in possession of the property and no one is disputing their right to possession, which is notice to the world of their title to and rights in the property. As pointed out by the Appellate Court, it is apparent from the complaint that the lease always has been, and still is, a valid instrument evidencing the agreement of the parties, that a lessee is bound to admit his landlord's title, and the general rule is well settled that a valid lease cannot be a cloud upon a title."
>
> "We are of the opinion that the complaint in this case presents no basis for equitable jurisdiction, and that the judgment of the Appellate Court remitting the parties to such action at law as they may have at law is right and must be affirmed. Judgment Affirmed."

Clearly that case confirms our citation of the case of *Powell* v. *Powell* at page 34 of Petition, 335 Ill. 533 at 538, which rules that ejectment at law is the remedy for lessor to use and that motions by Mrs. Ellithorpe to dismiss burnt record petitions should have been sustained. The Supreme Court should reverse those orders and dismiss the proceedings entirely with costs against Respondents.

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Since Respondents have admitted that the *Hill* case prevented them from using a quiet title suit or suit to remove clouds, it follows that they also are remitted to suit at law. Since the *Pullman* case above places burnt record suit within the nature and practice of chancery procedure, it follows that Respondents are equally forbidden to use burnt record suits to remove a leasehold. They did not by any pleading attempt to do so. Any claim in their brief that they have done so, clearly is unfounded and fraudulent. Furthermore Respondents refused to allow Ellithorpe as a defendant, to raise any issue about the leaseholds. They insisted then that circuit court as chancery court had no jurisdiction thereof.

No language of Burnt Record Act purports to authorize any proceeding under Burnt Record Act to affect leaseholds and interests arising from leaseholds. This absence of power confirms the case of *Powell* v. *Powell* discussed at page 34 of Petition.

Burnt record proceedings never were known at common law. Petitioners admit they are special statutory proceedings. The burnt record act nowhere mentions destruction of any leaseholds. On the contrary, partition writs at law existed at common law, and in Illinois until recently, January first 1950. Partition in Illinois now is regulated by statute, but the right precedes that regulation. Sections 27 and 28 of partition act, Chapter 106, pars. 70, 71. This law confirms suit in Superior Court at Cook County.

If the statement by Respondents is correct, that they cannot prove an ejectment suit; nevertheless that fact and inability does not create any right to maintain burnt record proceedings. The burnt record action is not any substitute for lack of proof in ejectment action.

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Since Respondents admit that suit to quiet or remove cloud from title, would not lie to affect the leasehold, as ruled by the *Hill* v. *Hinman* case, it follows that burnt record proceedings likewise are not usable for any such purpose. Thus in *Harms* v. *Coryell*, 177 Ill. 496 at 503 the opinion by Supreme Court of Illinois so rules:

> "The effect of such a decree (burnt record case) finding title to land in the petitioner against defendants is to settle the title between the parties as *effectively as though rendered on a bill to quiet title or remove a cloud from title.*"

Pleadings and motions by Mrs. Ellithorpe are sufficient demand for dismissal of all Burnt Record proceedings at bar.

As shown by abstract (49, 97, 100, 107 and elsewhere.) Ellithorpe by pleading, motion, and exception, demanded dismissal from the proceeding, for herself, Lake Dearborn Corporation, and stockholder interests, *after Petitioners joined issue in partition suit in Superior Court case.* Mrs. Ellithorpe has right and positive duty to defend and preserve the complete integrity of the Partition proceeding in the Superior Court. Mrs. Ellithorpe can not represent the other parties to partition but she must here preserve the right of all parties to be *heard* in that partition proceeding. (Pages 25-27 below.)

The plea in bar filed by Ellithorpe, based upon bankruptcy decree in 1936 (Abst. 37-38) and motion by her in support of same (Abst. 41) are in proper form under the rules of court. That plea in bar expressly states (Abst. 38-3):

> "From that decree on December 16, 1936, in cause 56924, no appeal nor review was ever taken. That

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> final decree remains in full force and effect. All parties to this present suit and their grantors and privies and all the property mentioned in this present suit were parties to that reorganization suit and all are bound thereby."

In view of that direct language, admitted by their motion to strike the plea the statements by Respondents in their brief, are directly contrary to the record. By their motion they admit the relevancy and effect of *Stoll* v. *Gottlieb*, 305 U.S. 165, to bar an action and suit at bar.

Especially the circuit court was wrong in failing to sustain the counter motion by Mrs. Ellithorpe (Abst. 41), asking to carry back to the burnt record petitions, the motion by the Petitioners to strike her plea in bar.

Furthermore by the case of *Gage* v. *DuPuy*, 127 Ill. 216, the Supreme Court of Illinois overruled the trial court and ruled for a dismissal in favor of the defendant, on a plea of statute of limitations, in a burnt record case. That case fully warrants a ruling by this court on present record to sustain the pleas of statutes of limitation by Mrs. Ellithorpe (Abst. 42, 48, 104, 106).

After the answer, *caveat* and cross-claim by Mrs. Ellithorpe were stricken from this litigation, by demand of Respondents, without prejudice to renewal in a separate litigation; none of the cooperative admissions made by that stricken pleading, were or are available on this record to aid Respondents or their decrees. That wrongful dismissal became and remains the law of this record. After such dismissal, the motions on this record by Mrs. Ellithorpe were and are unlimited by any admission by her whatever. Those motions were and are amply sufficient to overcome and destroy the pleadings by Respondents; and to warrant dismissal of these burnt record proceedings. This Supreme Court should so order.

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Therefore Ellithorpe reaffirms her argument that under the constitutions, the decrees January 8, 1954 are void for want of adequate pleading by Petitioners. All pleas and motions by Ellithorpe for dismissal are valid and sufficient defenses. All defenses by Ellithorpe should have been sustained. Complete reversal should now be ordered.

III.

No foundation for judicial Notice.

If the court could take judicial notice of the Chicago Fire, for the purposes of a burnt record suit, it must also take judicial notice of every court house fire or other record burning in Illinois at any time.

The request by Petitioners for the Master to take judicial notice was objected to by Appellant, when made by counsel for Respondents (Abst. 187, 146, 102 and 104). That request was not supported by Respondents in any manner. No basis has been laid for judicial notice, beyond mere request to do so. Such request is not enough. *Shopleigh* v. *Mier,* 299 U.S. 468 at 475.

No basis for evidence for Respondents.

In *Harding* v. *Fuller,* 141 Ill. 308, the opinion reads (30 NE 1053 at 1055):

> "Upon the hearing the solicitor for petitioners made oath, as required by the statute, that the originals of the deeds and other documents in writing, and the records relating to the title of the said premises up to October, 1871, were lost, and destroyed by fire, and not within the power of petitioners to produce the same."

In the cases at bar no such basis was laid for any evidence at all. We mention this at pages 23, 25, 36, 37 of opening Petition. But Respondents fail to discuss the matter of this jurisdictional situation. Petitioner Ellithorpe never has waived her jurisdictional objections. (Abs. 150, 168-179).

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The current decision, *Thompson* appellee v. *McGruc* appellant; 3 Ill. 2nd 168, reversed judgment given for plaintiff based only upon pleadings; because *affirmative proof is jurisdictional.* Section 14 of the burnt record act demands "proof of the facts stated in the petition".

At page 187 of abstract the record shows that Eminent Counsel for Respondents stated he would have witness Farr to come to testify to certain matters which Counsel stated are jurisdictional. Mr. Farr was not again a witness. As matter of record, there is no pleading to lay a foundation for any such testimony or evidence for the Respondents. It thus appears that *the jurisdictional point has not been proven,* that none of the Respondents are free from fault as to any loss of records by fire or otherwise.

Therefore Ellithorpe reaffirms her petition page 35, that the decrees January 8, 1954 are void for want of adequate evidence to support any decree, and void for reliance upon judicial notice of events for which no foundation was laid.

Ellithorpe reasserts her Petition page 38, and especially calls attention to the following matters of confusion.

Consolidation Order.

The order for consolidation is expressly based upon the motion therefor and the affidavit therefor (Abst. 30-33). That order provides for immediate consolidation by these words: (June 17, 1947)

> "and *shall proceed as a single suit* to be designated hereafter by all pleadings, notices and orders as burnt record 1767" (Abst. 33).

The consolidation made both cases one. Whatever appears in the record of either is part of the whole case.

Shifting Contentions by Respondents.

Respondents now say that they made Mrs. Ellithorpe a party because of her *caveat* filed in recorders office of Cook County December 28, 1945, (page 22 of the Abstract). We ask the Court to read that entire document and to remember that after it was filed Respondents accepted deeds subject to leaseholds of record. (Abst. 106). That made Respondents to be *subsequent purchasers, subject to the leasehold and subject to the caveat.* (Abst. 32)

Generally speaking the Respondents do not openly question the statements nor the citations of authority mentioned by the Petition for Writ of Certiorari filed herein by Mrs. Ellithorpe. At page 9 Respondents evade frank admissions by these vague words:

> "The organization of petitioner's statement and argument is such that it is not feasible, or even possible, to answer her contentions in the order in which they are presented. Respondents will state and discuss what appear to be the principal contentions of Petitioner."

That mode of confusion violates the rules by which an Answer should proceed. The Petition follows the rules. Respondents should do likewise. Their method avoids direct admission, but Respondents do not actually deny the petition nor validity of citations made.

In fact parts of the Answer taken alone, confess error.

Thus at page 16 Respondents say:

> " * * *the final decrees specifically do not dispose of the only claim she ever asserted*—that is, that she had a lien against the property".

And at page 15 Respondents say:

> "Petitioner claimed a lien and, while Respondents contend the claim is without validity, the decrees ap-

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pealed from preserve whatever lien claim she may have".

And at page 8 Respondents say:

"The only claim Petitioner ever made with respect to the real estate described in the pleadings is that she had a lien against it. Respondents deny that she had any lien, but if she had one it is not affected by the decrees, which expressly preserved to her the right to establish a lien in some other proceeding if she can (Abstract 133). *Thus the decrees do not deprive Petitioner of any substantive rights she ever claimed.*"

And at page 5 Respondents say:

"Petitioner was served with summons in each case and in each case appeared and filed a pleading designated 'Answer and Cross-Petition for an accounting and Lien'. This pleading was stricken on motion of Petitioners because of the provision of the statute that liens and claims for liens cannot be disposed of in a Burnt Record proceeding and because an accounting is not germane to the petition. It should be noted that the final decree in each case (Abst. 133) contains the following language:

> 'Neither this proceeding nor this decree should in anywise affect any lien or liens or claim or claims for lien or an accounting in a separate and distinct proceeding to which the fee of the real estate hereinabove described may be subject, etc.'

In November 1947, Petitioner filed a suit in the Superior Court of Cook County for partition and an accounting (Abst. 122) and the Respondents and other defendants not parties to the Burnt Record proceedings filed answers. The abstract shows only the answers of certain defendants who were not parties to these present suits (Abst. 26). This Superior Court suit involves the same real estate as the instant case and is still pending and undisposed of."

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Unfortunately for all concerned, the logic of such admissions, is made a fog by other statements by Respondents in their Answer. There is no stability in any position taken by Respondents. For at pages 5, 10, 11, 15 and 16, Respondents say that the *caveat* was the reason to summon Ellithorpe. Thus at page 15 Respondents say:

> "It is clear that Petitioner recorded an instrument as a cloud on Respondents' title; that she was personally served and given an opportunity to support the claims set out in the recorded instrument. When her claim for lien was stricken, she made no other claim but filed the suit now pending in the Superior Court of Cook County. No federal question can arise from this situation."

No reference was made by Respondents at any time in the trial record, to the *Caveat* filed by Ellithorpe in the Recorder's office (Abst. 80). (*Caveat* is based on leasehold, which is not within meaning of the phrase "cloud on title"). Consequently the whole of that *caveat* is properly basis for the case *removed from this record* and now pending in the Superior Court. That is all the more true because the Respondents by their own motion stating—

> "4. This court has no jurisdiction in this proceeding to hear and determine any of the issues sought to be raised by *said pleading.*" (Abst. 26)

obtained in this Burnt Record suit an order (Abst. 34), which dismissed "said pleading", (the answer, *caveat* and cross-petition, presented herein by Ellithorpe), without prejudice to Ellithorpe pursuing same in another suit. (Abst. 34).

Petitioner submits that the effect of Respondents' failure (1) to mention or contest the *caveat* as fact anywhere in their trial court record, (2) plus their motion to dismiss

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without prejudice the pleading by Ellithorpe based upon said *caveat*, without prejudice to pursuing same in some other proceeding, (3) plus their answer filed in Superior Court (Abst. 50 and 206ff) renders all statements herein in this Court by Respondents about *caveat* or claims by Ellithorpe, as unfounded, and an attempt by Respondents to attack their own dismissal order, and a wrongful smear upon the suit Pending in the Superior Court. (Abst. 50)

Petitioner asks that all statements in this Court by Respondents about *caveat*, and all attempt by Respondents to limit in any way the completeness of suit in Superior Court, based upon leasehold and *caveat*, (Abst. 4) be disregarded by this Court as an unfounded attack upon said order for dismissal June 17, 1947. (Abst. 34)

Respondents did not mention nor refer to the *caveat* nor to any items therein stated, by any pleading, nor by the decrees which they had entered from which appeals are taken. If Respondents desired to affect or erase the *caveat* and its contents from the title, they had ample opportunity to plead, between 1945 when *caveat* was recorded and 1954 when Respondents entered these decrees. (Abst. 107-134)

The Burnt Record petitions filed January 21, 1947 in Cook Circuit Court by Respondents say this (Abst. 11):

> "And your petitioners (Respondents) expressly charge the fact to be that all such persons, if any there are, have not, nor has any of them, any right, title, or interest, *or lien upon said lands, or any part thereof.*"

And Mrs. Ellithorpe upon receipt of summons, challenged that statement and the petitions generally, by her answer and cross petition (Abst. 15-25) filed February 24, 1947, as permitted by statute, chapter 116 par 17 (13). By her prayer to that answer and cross-claim she asked that (Abst. 21):

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> "All parties to this proceeding shall make answer to this cross-petition, that this claim for lien be heard and awarded to her; that she may have complete discovery as to all matters herein mentioned; and that she may recover the same by personal judgment, and by decree of foreclosure or other appropriate relief in this court".

Ellithorpe asks that the Court will read that pleading in entirety.

The motion by Respondents to "strike and dismiss" said answer and cross-claim (Abst. 26), *made no reference to any statute,* but Respondents by their motion did say: (Abst. 26):

> " This court has no jurisdiction *in this proceeding* to hear and determine any of the issues sought to be raised by said pleading."

and Respondents presented the order by which the court (Abst. 34):

> "doth find that the said motion should be allowed" and without prejudice said answer and cross-claim, "is hereby dismissed as to said plaintiffs and counter-defendants" (burnt record petitioners now Respondents).

If as Respondents now say, the *caveat* was their reason for serving Mrs. Ellithorpe with summons, why did they not also serve with summons, Lake Dearborn Corporation and all other stockholders, *whose interests are equally established by that caveat?* (Page 18 above.)

And why did Respondents as above shown, at once contend by their motion that the *caveat* and pleading thereon must be dismissed, without prejudice to action in another suit and court?

And why did Respondents as defendants in that removed suit in Superior Court, filed by Mrs. Ellithorpe after such

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forced dismissal, take issue by their answers to subject matter of *caveat* and leasehold (Abst. 50 and 205-228)? That new suit proceeds against the same real estate, and against Respondents on this record, as defendants there as owners of the reversion (Abst. 222) and that pleading at paragraph 23 asks for a lien against the reversion, to answer us orally by former stockholders.

And how could Respondents now contend that the leasehold comes within the scope of the decrees at bar, wholly contrary to their motion above quoted and the dismissal orders? Reversals of positions by Respondents are confusion after confusions. (Page 22 above.)

Since the factual matters making up her *caveat*, answer and cross-claim in this case were stricken and dismissed without prejudice, and all were taken to Superior Court (Abst. 15-25, 26, 34, 49-50, 206-232) the request by Respondents after such events, that such factual matters be pleaded again in the burnt record suits (their brief 15) is mere absurdity and facetious conduct. Respondents continue after decree, further harassment against Mrs. Ellithorpe.

Sham, Fraud and Evasion.

Respondents say these are harsh words. They are just that. But they are modest in comparison with the misconduct by Respondents in managing this litigation (Petition page 53ff), and in entering such decrees, and their devious argument used for defending against appeal.

The only continuity of purpose and performance, shown on this record by Respondents, is their potent desire to confiscate the more than a million dollar improvements made by Lake Dearborn Corporation with money from the stockholders, upon the leasehold property and estate; and the desire of Respondents to do that without payment to anyone; without pleading the existence of said leasehold

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and improvements, without any evidence about the leasehold matters; and without telling any court about the plans and intentions of Respondents (Petition pages 53ff.) The Burnt Record suits are shams. (Petition Pages 27, 29)

By evasion and fraudulent pleading, Petitioners seek confiscation of leaseholds and rentals, by delays: *Weber* v. *Mick*, 131 Ill. 520, 23 NE 646 at 649: *Sherwin-Williams* v. *Watson*, 361 Ill. 599 at 605; 198 NE 2d at 707.

Custody by Respondents of leasehold property (begun during World War II and continued during and since Korean war period) arose and continues only as custodian for Mrs. Ellithorpe and Stockholders.

The solid fact is that any possession by Respondents arose and continues under "Dearborn-Lake Rent Assignment" (Abst. 231), which they received from Lake Dearborn Corporation in 1942 (Abst. 19, 208, 219-21, 231-232 and Petition page 53ff). Their possession is that of fiduciary under said assignment of rents, which recognize the validity of the leaseholds and all the leasehold property. The record establishes that trust as continuing, for benefit of Mrs. Ellithorpe and all other beneficiaries of leasehold. Under said rent assignments, Respondents not only performed duties as management agents for said beneficiaries, but they paid certain corporate expenses of Lake Dearborn Corporation during 1943-1944 (Abst. 230-232), out of the rents so collected by them as trustees (Petition page 53ff). This is shown by their said accounting rendered at that time. No act is shown by Respondents to divest themselves of said fiduciary relation and trusteeship under said rent assignments. (Petition page 54)

Where fiduciary relation has been shown, the burden lies upon the fiduciary trustee to plead and prove fair-

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ness in termination thereof. All presumptions are against such trustee, who must establish the contrary. In that situation *Tanner* v. *Tanner*, 326 Ill. 302, rules as follows:

> "Decrees in chancery must be based upon the record in the case, and not upon assumptions of counsel differing therefrom, and if the decree contains recitals which are not supported by the record, such recitals must be disregarded." 157 NE 164.

The burnt record decrees lack record support to meet the rule of that decision. *Ambrosius* v. *Katz*, 2 Ill. 2d 173, 181.

Factual Pleas by Ellithorpe.

Contrary to frequent statements throughout Respondents' Answer, Mrs. Ellithorpe did file and now continues on these appeals to assert, various later pleadings in the burnt record suits (Abst. 37, 41, 42, 45, 48, 60, and 96). All factual matter thereby used as defense herein, the Respondents have admitted to be true for purposes of this record, by their motions to strike which were sustained by the trial judges (Abst. 26, 40, 43, 62, 84 and 97). Those factual matters establish former adjudication, estoppel by limitation, estoppel by laches and want of jurisdiction, and want of equity for chancery jurisdiction. This court on appeal should reverse the orders, should sustain all those pleading contentions by Mrs. Ellithorpe. This Court should dismiss these burnt record proceedings, as prayed by all those pleadings (Petition page 50).

Contrary to statements in Respondents' Answer, the record shows adequately there are more than 800 stockholders who were never served and never notified about this suit (Abst. 46, 101 and 153). Above pages 7, 8.

The theory of Respondents that they can claim against 800 other people, but serve with summons only Mrs. Elli-

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thorpe, violates the basic rule of law decided by *Giese* v. *Terry* and other cases (Page 31 Petition).

Frequently the brief for Respondents says that Ellithorpe misconstrues or misunderstands the meaning and effect of the record. But they never point out how or wherein such statements are true. Many bold statements are made by that brief, which are not referred to any part of the record, and are wholly contrary to the record.

V.

At several places in their brief Respondents give names to pleadings and then argue against the pleadings, using words that define the names in a narrow and misleading manner. The whole purpose of pleading is to state facts, and the facts so stated are the only measure of the rights thereby asserted. Our courts of record adjudicate upon the facts pleaded and the facts proven—both are necessary basis to arrive at a decree. Neither the names of pleadings nor the relief asked can control the action of the court upon the pleading and the evidence.

Respondents' false argument about lien.

Request for a lien is request for one form of remedy. A lien is not a cause of action but a method of satisfaction. You ask for a lien as you ask for any manner of writ or relief. A proper objection to lien is like proper objection to a writ. The objection is not a cause of action, but to manner of relief. Eminent opposing counsel made the huge mistake of moving to strike and dismiss the entire cause of action set forth by Mrs. Ellithorpe by her *caveat*, answer and cross-claim, without prejudice to renewal which has been accomplished by the suit in Superior Court. That action by said Counsel is not supported by the statute as

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to lien, which would have been executed by a motion to deny writ of lien. Having made the foolish motion and causing confusion to all concerned, they now contend that only the relief of lien was moved out of this case. That contention is utterly facetious in view of the sweeping motion which they made and carried into order June 17, 1947 (Abst. 26, 34-35). The order was wrong, but all parties carried it to full execution (Abst. 206-232), by the new suit in the Superior Court of Cook County, which remains pending and unheard. (Abst. 50)

Respondents have taken issue re leaseholds in Superior Court (Abst. 50 and 206ff) and Appellant filed her reply thereto, in the Superior Court of Cook County. (Answer herein by Respondents at page 5).

As shown above at page 25 the burnt record petitions by positive denial of *lien,* and by summons served upon Mrs. Ellithorpe, compelled her to come into the burnt record litigation, and there assert her claim for lien along with other claim for relief, upon the factual matters set forth by *caveat* and her pleading thereon. Respondents then did a somersault and repudiated their own pleading petition against *lien.* However Respondents instead of limited motion to refuse lien relief, under section 34 of civil practice act, Respondents demanded dismissal of all claim and pleading by Mrs. Ellithorpe under her *caveat,* without prejudice to her pleading same in another separate litigation. That motion and order were unfounded, but the opposition of Mrs. Ellithorpe was overruled and the order entered, *effecting a severance and divestitute of jurisdiction as to all matters of caveat, answer and cross-claim pleadings.* (Petition at pages 40-42.)

Later Respondents repented of their rash action. They now urge that Mrs. Ellithorpe should have repleaded said

matters in the circuit court, after they had taken issue on them in superior court. As shown above Respondents have shown repeated instability, by reversal of position, repeatedly for seeming momentary advantage. If the confusion were not tragic, their reversals of positions would be ludicrous.

By her answer and *caveat* and cross-claim, Mrs. Ellithorpe sought to make general and vigorous defense to Burnt Record proceedings. For example (Abst. 19):

> "Your defendant and counterclaimant denies expressly, all part of said (burnt record) petitions which may be in conflict herewith; specifically she denies that paragraphs third, fifth, seventh, eighth, and ninth of said petitions are true, against her or against her claims herein made."

The heart of that pleading by Mrs. Ellithorpe in circuit court in burnt record proceedings (Abst. 18-19), and likewise the heart of her suit in superior court (Abst. 219-221), are the same, namely—leasehold interests, stockholders as beneficiaries, and fiduciary relations and duties of Respondents as reversioners, who are in control of said real estate as assignees for rentals for conversation and accounting to Mrs. Ellithorpe and stockholders, who are owners of leasehold as tenants in common as successors to the defunct Lake Dearborn Corporation. The specific relief asked by partition which is pending in superior court suit, is not about different subject matter, nor outside the *general relief* which was asked in circuit court by Mrs. Ellithorpe in burnt record proceedings. (Abst. 21)

Respondents by their answers in superior court, (Abst. 50 etc.) have raised issues about leaseholds and successor stockholders as their beneficiaries, and relief flowing from the rental assignments. Thereby Respondents by their

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own action then established and admitted as early as 1947, that the leasehold and subsequent issues had been removed from burnt record litigation to become pending in superior court. And Mrs. Ellithorpe filed her reply in superior court, to close those issues in that court; where they remain pending and unheard. (Abst. 50: Answer Brief by Respondents at page 6)

Larson v. *Johnson,* 1 Ill. App. 2d 36 at 39.

Wherefore Ellithorpe reaffirms her Petition, and reasserts that under said constitutions, the decrees January 8, 1954 are void because contrary to *res judicata* order of severance and divestiture of jurisdiction of subject matter removed by that order, June 17, 1947, which excluded leasehold. (Abst. 34)

Summary and Conclusion.

Petitioner submits she has established that:

1. By the record and decisions she has shown denial to her of an orderly proceeding, contrary to due process of law and equal protection of law, as provided by the constitutions of Illinois and the United States of America.

2. By supreme court decisions Mrs. Ellithorpe has shown and established her right as summoned defendant, to have all named defendants and all necessary parties, likewise summoned and served with court process in a constitutional manner, before hearing and decrees could proceed on this record.

3. Mrs. Ellithorpe thruout the record has stood upon and stated her constitutional objections, timely made and frequently repeated, before the Master and the circuit court. She repeats them on appeal.

4. The leasehold matters were not made part of the burnt record litigation at any time, and remain outside

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any action by decrees. The contrary contention by Petitioners is added wilful wrong.

5. The leasehold matters are being litigated in case 47S18083 in superior court of Cook county, upon adequate pleadings.

The parties to that litigation include Respondents at bar, and all stockholders of former defunct Lake Dearborn Corporation, and the real estate described by the decree in this Burnt Record litigation.

6. As to said leasehold matters, said suit in superior court, has precedence over this burnt record litigation, by order from circuit court on this record June 17, 1947, requested by Respondents. The Respondents are estopped by their own conduct on this record.

7. If Respondents as they say on appeal for *the first time on record* made Mrs. Ellithorpe a party because of her *caveat* about leaseholds and Lake Dearborn Corporation, which she filed on December 28, 1945 in the recorders office of Cook County, said Respondents have repudiated and abandoned that purpose, by their motion to strike and dismiss Ellithorpe pleadings based upon that *caveat* as exhibit A and leasehold matters, and Respondents have fully confirmed that repudiation and abandonment by filing their answers in writing to her separate suit on those leaseholds and subject matter of that *caveat* about leaseholds and Lake Dearborn Corporation, in case 47S18083 in superior court of Cook County.

8. After such repudiation and abandonment of leasehold subject matters by Respondents, it was inequitable persecution and wilful abuse of court process, for Petitioners to pretend that Mrs. Ellithorpe and Lake Dearborn Corporation and its successor stockholders, could be or remain proper or necessary parties to such burnt record

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litigation. It became unconscionable wrong for Respondents to refuse the demand then made against them on this record, that the burnt record litigation must be dismissed as against Mrs. Ellithorpe, Lake Dearborn Corporation and all stockholders as successors of that corporation.

9. The record shows that Respondents have used devious shifts and changes of position to remain in court, and now have no pleadings and no rational basis and no supporting evidence left, to sustain their decrees, brought here by these appeals.

10. The record shows that the value of Respondents land reversion, is small in relation to value of 99-year leasehold and 12 story modern commercial building improvements, paid for and constructed by money from shareholders of Lake Dearborn Corporation. For that alone, the burnt record litigation should be dismissed with all costs assessed against the Respondents.

Federal Questions Established.

Petitioner Ellithorpe reasserts her Petition as follows: The Petition and record shows denial of due process and denial of equal protection of law and denial of equal and fair administration of constitutions and the laws above stated. A decree of United States District Court in reorganization case upon which Ellithorpe relied in making her investment, has been ignored and refused enforcement. Statutes of limitation have been ignored and refused enforcement, altho currently enforced in favor of other litigants as shown by the Petition. Contrary to statute, the Supreme Court of Illinois failed and refused to render opinions, and refused to allow filing of Petition for Rehearing, permitted for all persons for whom opinions are written. The Appellate Court of Illinois files cryptic opin-

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ion, refusing to discuss questions presented raising issues under the constitutions of Illinois and of the United States, although the Supreme Court of Illinois holds invalid in a current case another statute adverse to Article VI of the Constitution of the United States. Other unconstitutional denials to Ellithorpe are set forth at page 50 of Petition herein filed. All the foregoing violated the rights of Petitioner under the provisions of Constitutions set forth at Appendix D to her Petition.

All of these federal and constitutional and jurisdictional questions, were ignored by the Circuit Court of Cook County, and also were ignored by the Supreme Court of Illinois. Those courts did not file opinions. See Petition pages 2 and 43. Likewise those basic questions and issues were ignored expressly by Opinion of the Appellate Court of Illinois, See pages 43, 59 of Petition for Certiorari. Each of said Courts of Illinois, failed and refused to perform its duty under Article VI of the Constitution of the United States. See Petition at pages 42-44.

The shifting contentions by Respondents and their repeated instability of position on the record, compel this appeal by Ellithorpe for review before Youor Honors. See above, especially at pages 22 ff.

THE AMERICAN IDEA, a July Fourth Editorial (July 3, 1956), in the Wall Street Journal, quotes John Adams, a Founder, as follows:

> "The moment the idea is admitted into society that property is not as sacred as the law of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence".

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Schuyler County v. *Missouri Bridge Company*, 256 Ill. 348 at 352, corrects the citation made at page 40 of Petition.

This No. 148 October Term 1956, is the same as No. 1013 to the October Term 1955 of this Court.

Petitioner again urges that her Petition for Certiorari shall be granted; and that writ be issued for full hearing in this Court upon the record.

Respectfully submitted,

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